91-27

Supreme Court, U.S.
FILED
JUL 2 1991
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of The United States

October Term, 1991

ARCH A. MOORE, JR.,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under Rule 32(d) of the Federal Rules of Criminal Procedure, Petitioner's submission of two uncontroverted affidavits and detailed presentation of supporting facts entitles him to an evidentiary hearing on his Motion to Withdraw his guilty plea which was made before the imposition of sentence?

2. Whether the government's violation of the plea agreement with Petitioner requires that Petitioner be permitted to withdraw his guilty plea?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

REFERENCE TO OPINIONS RENDERED BELOW . . iv

JURISDICTIONAL STATEMENT 1

RULE AT ISSUE IN THIS CASE 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THIS PETITION 3

A. REVIEW IS NEEDED BECAUSE THE FOURTH CIRCUIT'S DECISION ESTABLISHES TWO IMPROPER REQUIREMENTS UNDER RULE 32(d) WHICH MAKE IT VIRTUALLY IMPOSSIBLE FOR A PLEA EVER TO BE WITHDRAWN 4

B. PETITIONER SHOULD BE PERMITTED TO WITHDRAW HIS PLEA BECAUSE THE GOVERNMENT BREACHED THE PLEA AGREEMENT BY RECOMMENDING A "SUBSTANTIAL SENTENCE" 7

CONCLUSION 8

APPENDIX

FOURTH CIRCUIT OPINION A-1

DISTRICT COURT PROCEEDING DENYING MOTION TO WITHDRAW GUILTY PLEA A-9

AFFIDAVIT OF WILLIAM G. HUNDLEY A-46

SECOND AFFIDAVIT OF WILLIAM G. HUNDLEY A-50

PLEA AGREEMENT A-55

DISTRICT COURT SENTENCING PROCEEDING A-61

TABLE OF AUTHORITIES

Cases:

Santobello v. *New York*,
404 U.S. 257 (1971) 7

United States v. *Crusco*,
536 F.2d 21 (3rd Cir. 1976) 7

United States v. *Fountain*,
777 F.2d 351 (7th Cir. 1985), *cert. denied*,
475 U.S. 1029 (1986) 4

United States v. *Goldberg*,
862 F.2d 101 (6th Cir. 1988) 4

United States v. *Hurtado*,
846 F.2d 995 (5th Cir.), *cert. denied*,
488 U.S. 863 (1988) 4

United States v. *Ray*,
828 F.2d 399 (7th Cir. 1987), *cert. denied*,
484 U.S. 1045 (1988) 4

United States v. *Russell*,
686 F.2d 35 (D.C. Cir. 1982) 4

Rules:

F.R.Crim.Pro. Rule 11 5

F.R.Crim.Pro. Rule 32(d) 2, 4, 5, 7

REFERENCE TO OPINIONS RENDERED BELOW

United States of America v. *Arch A. Moore, Jr.*, 931 F.2d 245 (4th Cir. 1991)

United States of America v. *Arch A. Moore, Jr.*, Criminal No. 2:90-00078 (S.D.W.Va. filed July 9, 1990)

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PETITION FOR A WRIT OF CERTIORARI

JURISDICTIONAL STATEMENT

Petitioner, Arch A. Moore, Jr. (hereinafter "Petitioner"), seeks review in this Court of a decree entered on April 23, 1991 by the United States Court of Appeals for the Fourth Circuit (hereinafter the "Fourth Circuit"). *See* Appendix, p. A-1. On May 16, 1991, the Fourth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing In Banc. This Court has jurisdiction to review the decree in question by a writ of certiorari pursuant to 28 U.S.C. § 2101(c).

RULE AT ISSUE IN THIS CASE

The crucial issue in this case concerns the appropriate interpretation and implementation of Rule 32(d) of the Federal Rules of Criminal Procedure regarding the withdrawal of a guilty plea before sentence is imposed. Rule 32(d) states as follows:

> **(d) Plea Withdrawal.** If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

F.R.Crim.Pro. 32(d).

STATEMENT OF THE CASE

This case arises from Petitioner's attempt to withdraw his plea of guilty before sentence was imposed by the United States District Court for the Southern District of West Virginia (hereinafter the "District Court"). Petitioner signed a plea agreement with the government on April 12, 1990, pursuant to which he pled guilty to a five-count indictment. *See* Appendix, p. A-55. The indictment resulted from an investigation into Petitioner's 1984 campaign for the office of Governor of the State of West Virginia and his conduct as Governor. The indictment charged mail fraud (18 U.S.C. § 1341), extortion (18 U.S.C. § 1951), two counts of filing a false tax return (26 U.S.C. § 7206), and obstruction of justice (18 U.S.C. § 1503). Jurisdiction in the District Court was based on the foregoing federal statutes.

On June 27, 1990, pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, Petitioner moved the District Court to withdraw his guilty plea. The three principal reasons presented for withdrawing Petitioner's plea were: (1) his repeated assertions of innocence; (2) the defenses he had available; and (3) the extremely coercive circumstances surrounding his decision to plead guilty.

In support of his Motion to Withdraw, Petitioner's counsel submitted two affidavits which showed that Petitioner had consistently maintained his innocence before, during and after the plea negotiations with the government. The affidavits also noted some of the

defenses which Petitioner had available. Finally, the affidavits showed that Petitioner's decision to plead guilty was strongly influenced by the recommendation of his counsel and the fact that the government gave Petitioner less than twenty-four (24) hours to sign the plea agreement. *See* Appendix, A-47.

Despite this showing, the District Court denied Petitioner's Motion to Withdraw without holding an evidentiary hearing. The following day, July 10, 1991, the District Court sentenced Petitioner. At the sentencing proceeding, the prosecutor implored the District Court to impose a "substantial sentence." Although the District Court agreed with Petitioner's prior counsel that the prosecutor's remarks ran contrary to the government's obligation under the plea agreement not to recommend a specific sentence, the District Court enforced the plea agreement. *See* Appendix, p. A-106 - A-109.

On appeal, the Fourth Circuit affirmed the District Court's decision. The Fourth Circuit held that Petitioner did not meet his burden under Rule 32(d) for entitlement to an evidentiary hearing, and that the remarks made by the prosecutor at sentencing did not violate the plea agreement. *See* Appendix, p. A-3 - A-4.

REASONS FOR GRANTING THIS PETITION

Review is warranted in this case because the questions presented are extremely important. The circumstances under which a guilty plea may be withdrawn and plea agreements may be enforced are of obvious nationwide significance. This Court has not previously dealt with the contours of Rule 32(d) in circumstances such as those presented here. The Fourth Circuit's sanctioning of the District Court's decision represents a marked departure from accepted procedure under Rule 32(d). This Court's intervention is needed in order to correct this error, and to settle the appropriate boundaries of Rule 32(d).

A. REVIEW IS NEEDED BECAUSE THE FOURTH CIRCUIT'S DECISION ESTABLISHES TWO IMPROPER REQUIREMENTS UNDER RULE 32(d) WHICH MAKE IT VIRTUALLY IMPOSSIBLE FOR A PLEA EVER TO BE WITHDRAWN

Under Rule 32(d) of the Federal Rules of Criminal Procedure, a plea may be withdrawn before sentencing "upon a showing by the defendant of any fair and just reason." Courts are supposed to consider the following six factors in determining whether a "fair and just reason" for withdrawing a plea has been presented:

(1) whether the movant has consistently maintained his innocence or presented a defense;

(2) the length of time between the entry of the plea and the motion to withdraw;

(3) the reason why the basis for withdrawal of the plea was not previously presented;

(4) the circumstances underlying the entry of the plea;

(5) the prejudice, if any, to the government if the plea is withdrawn; and

(6) whether the court will be inconvenienced and have its resources wasted.

See United States v. *Goldberg*, 862 F.2d 101, 104 (6th Cir. 1988); *United States* v. *Hurtado*, 846 F.2d 995, 997 (5th Cir.), *cert. denied*, 488 U.S. 863 (1988).

When a showing of "any fair and just reason" is made, the right to an evidentiary hearing is to be granted freely. *See United States* v. *Ray*, 828 F.2d 399 (7th Cir. 1987), *cert. denied*, 484 U.S. 1045 (1988); *United States* v. *Fountain*, 777 F.2d 351 (7th Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986); *United States* v. *Russell*, 686 F.2d 35 (D.C. Cir. 1982). Indeed, an "evidentiary hearing should be routinely granted unless the movant produces no substantial evidence that impugns the validity of the plea." *Fountain*, 777 F.2d at 358, n. 3. An evidentiary hearing should be denied only when "mere conclusions" or "barebones" allegations are presented. *Id.* at 358.

Here, the Fourth Circuit and District Court applied two improper standards which make it virtually impossible for a plea ever to be withdrawn. First, they held that a showing of fraud was necessary before a plea could be withdrawn. *See* Appendix, p. A-31. Second, and even worse, they rationalized their decision not to grant an evidentiary hearing on the ground that, because Petitioner's plea was entered following an inquiry under Rule 11 of the Federal Rules of Criminal Procedure, Petitioner should not be entitled to testify because he could face a charge of making a false statement. *See* Appendix, p. A-5. When Petitioner argued that these standards would forever forestall the withdrawal of a guilty plea, the District Court responded that:

> **THE DISTRICT COURT**: I don't think that it forever stalls it, no, because there may have been acts of fraud by the parties that might have upset it.

Appendix, p. A-31.

Obviously, every defendant who wishes to withdraw his plea after a Rule 11 proceeding faces the possibility of being charged with making a false statement. However, no provision in Rule 32(d) states or even suggests that a plea may not be withdrawn after a Rule 11 inquiry. Likewise, Rule 32(d) does not require a showing of fraud.

Thus, the Fourth Circuit approved the establishment of two insurmountable barriers to obtaining relief under Rule 32(d), *i.e.*, the need to prove fraud and the need to seek relief before a Rule 11 inquiry. This was plainly erroneous and contrary to the terms of Rule 32(d).

Significantly, the Fourth Circuit expressed disquiet over the fact that neither it nor the District Court "has any idea what it is that [Petitioner] would have said from the stand." Appendix, p. A-3. However, the affidavits submitted by Petitioner's prior counsel provided detailed information as to what Petitioner would have said regarding his innocence, defenses and other reasons for wanting to withdraw his plea. *See* Appendix, p. A-46 - A-54. Thus, the Fourth Circuit and the District Court were presented with a clear roadmap regarding Petitioner's testimony; they simply chose to ignore it. Moreover, the Fourth Circuit's concern over what Petitioner's testimony would have been only further demonstrates the error in denying Petitioner an evidentiary hearing.

The facts presented below clearly show that, had the appropriate factors been applied, Petitioner fully met his burden for entitlement to an evidentiary hearing. First, it was established that Petitioner maintained his innocence before, during and after entering into plea negotiations with the government, and immediately after he pled guilty. *See* Appendix, p. A-52 - A-54. Indeed, the government became so distressed with Petitioner's constant assertion of innocence, that it threatened to advise the District Court that Petitioner was not fulfilling his obligation under the plea agreement to cooperate. *See* Appendix, p. A-54.

Second, the length of time between the entry of Petitioner's plea and his notification to the District Court that he was going to move to withdraw his plea was six (6) weeks. As shown in the affidavits of Petitioner's prior counsel, Petitioner constantly asserted his innocence during this interim period. Accordingly, Petitioner's prior counsel finally advised him to move to withdraw his plea because of Petitioner's adamancy regarding his innocence. *See* Appendix, p. A-54.

Third, Petitioner showed that the reason why the grounds for withdrawal of the plea were not presented previously was due to the very brief time allotted to him to enter into a plea agreement and to evaluate the charges against him. *See* Appendix, p. A-51 - A-52.

Fourth, the circumstances underlying Petitioner's plea indisputably showed that his decision to plead guilty was made with great haste and without the benefit of having time to reflect. *See* Appendix, p. A-52 - A-53. The government gave Petitioner less than twenty-four (24) hours to decide to sign the plea agreement, despite his request for additional time. Petitioner likewise virtually had no opportunity to review the government's statement of the evidence against him before entering his plea. Forced haste, rather than voluntary reflection, was the catalyst for Petitioner's plea.

As to the fifth factor, prejudice to the government by withdrawal of the plea, the Fourth Circuit found that the government had not made an adequate showing of prejudice. *See* Appendix, p. A-5. The final factor, inconvenience to the court and the expenditure of judicial resources, similarly provided no basis for denying Petitioner an evidentiary hearing.

In sum, the Fourth Circuit ignored the terms of Rule 32(d) and existing precedent. It ignored the incontrovertible facts supporting Petitioner's Motion to Withdraw, and wrongly created new requirements for relief under Rule 32(d) which seldom, if ever, could be satisfied. Therefore, this Court should grant review and remand this case with instructions to hold an evidentiary hearing.

B. PETITIONER SHOULD BE PERMITTED TO WITHDRAW HIS PLEA BECAUSE THE GOVERNMENT BREACHED THE PLEA AGREEMENT BY RECOMMENDING A "SUBSTANTIAL SENTENCE"

This Court has long held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello* v. *New York*, 404 U.S. 257, 262 (1971). If the government fails to adhere to the plea agreement, the sentence must be vacated and the matter must be remanded to the District Court to permit either withdrawal of the plea or specific performance of the plea agreement. *Id.* at 263. Such action is needed even if the District Court states that it was not influenced by the government's remarks about sentence. *United States* v. *Crusco*, 536 F.2d 21, 26 (3rd Cir. 1976).

Petitioner should be permitted to withdraw his plea, because the government breached the plea agreement. Under ¶ 9 of the plea agreement, the Government agreed to "make no recommendation as to a specific sentence." Appendix, p. A-58. When Petitioner was sentenced, however, the government implored the District Court to impose a "substantial sentence" so as to send a "strong message." Appendix, p. A-106 - A-107. When the government denied that it had recommended the sentence which should be imposed, the District Court correctly stated:

> **THE DISTRICT COURT**: Yes you have. You have made a recommendation that it be sufficiently severe.

Appendix, p. A-107.

The government's remarks clearly constituted a breach of the plea agreement. Under ¶ 12 of the plea agreement, Petitioner has the right to have the plea agreement voided because of that breach. The Fourth Circuit played a game of semantics when it found that these remarks did not violate the plea agreement. Appendix, p. A-8. The government's request that a "substantial sentence" be imposed so as to send a "strong message," had the same practical effect as if it had assigned a number to the length of sentence.

The Fourth Circuit recognized that its finding that the prosecutor's remarks did not violate the plea agreement was based on an unduly literal interpretation of the plea agreement. *See* Appendix, p. A-8. The Fourth Circuit rationalized its hyper-technical position, however, on the ground that, because Petitioner was represented by counsel, the plea agreement must be interpreted more strictly. *See* Appendix, p. A-8. This excuse defies common sense and justice. A breach is a breach, regardless of whether Petitioner was represented by counsel. The government's remarks regarding sentencing violated the plea agreement. Therefore, Petitioner should be permitted to withdraw his plea.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2, 1991

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-5819

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

versus

ARCH A. MOORE, JR.,
Defendant - Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Walter E. Hoffman, Senior District Judge. (CR-90-78)

Argued: February 7, 1991 Decided: April 23, 1991

Before RUSSELL, PHILLIPS, and MURNAGHAN, Circuit Judges.

Affirmed by published opinion. Judge Murnaghan wrote the opinion, in which Judge Russell and Judge Phillips joined.

ARGUED: William George Hundley, AKIN, GUMP, STRAUSS, HAUER & FELD, Washington, D.C., for Appellant. John M. Campbell, Public Integrity Section, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Larry S. Gondelman, Richard N. Wiedis, AKIN, GUMP, STRAUSS, HAUER & FELD, Washington, D.C., for Appellant. Michael W. Carey, United States Attorney, Joseph F. Savage, Jr., Assistant United States Attorney, Larry R. Ellis, Assistant United States Attorney, Charleston, West Virginia, for Appellee.

MURNAGHAN, Circuit Judge:

The defendant, former West Virginia Governor Arch A. Moore, Jr., signed a plea agreement with the government on April 12, 1990, in which he agreed to plead guilty to a five count indictment. However, he did not appear in court to enter his pleas of guilty until May 8, 1990. On the eve of his pleas, the government tendered to his attorney a twenty-six page memorandum that it intended to submit to the court in support of the guilty pleas. Defense counsel informed the government that the defendant would not agree to the factual proffer contained in the document and that, if the government insisted on filing it, there would be no guilty plea. The government agreed not to file the memo and presented a short oral proffer instead. The plea proceedings were held on May 8 and the court accepted the guilty pleas. Sentencing was set for July 10, 1990.

On June 19, 1990, the defendant's attorney wrote to the court that he intended to file a Motion to Withdraw Guilty Pleas. Such a motion was filed on June 28, 1990. As part of the motion, the defendant's attorney presented an affidavit of himself. The court then ordered the government to file its response by July 2, 1990, and ordered argument on the motion for July 9, 1990.

On July 9, a hearing was held. Defense counsel proffered an additional affidavit of himself, and asked for an evidentiary hearing at which he proposed to call the defendant to testify as to the basis for his motion to withdraw. The government opposed the request for an evidentiary hearing. The court held that the defendant had not met his burden of presenting a "fair and just reason" for the motion and refused to allow him to testify.

As a result, sentencing proceeded the following day. After hearing presentations by both sides, including a strongly worded plea by the government that the court make an example of the defendant, the court sentenced the defendant to the following: six months on count one, five years on count two, two years on count three, two years on count four, and ten months on count five. The sentences on counts one, two, three, and four were to run concurrently with each other. The sentence on count five (the only one subject to the Sentencing Guidelines) was to run consecutively with the sentence on the other four counts. The court also stated that the defendant was immediately

eligible for parole on counts one through four. Finally, the court imposed fines totaling $170,000.00 and a special assessment in the amount of $250.00.

On July 18, 1990, the defendant filed a Notice of Appeal. The notice was amended on July 20, 1990 to correct an error in the original notice. The defendant then filed a Motion for Bail Pending appeal, which was denied. A Motion for Bail Pending Appeal was subsequently filed in this court and was again denied on August 6, 1990. Pursuant to the order of the district court, the defendant self-surrendered to the federal prison camp at Maxwell Air Force Base.

I.

Defendant has argued that the district court erred in denying his request for an evidentiary hearing on his motion to withdraw his guilty pleas. Specifically, he contends that he should have been allowed to take the stand himself, as the sole witness at such a hearing. The assertion would appear to be that, had the court granted him the opportunity to testify, his testimony might have carried the day, persuading the court to permit him to withdraw his pleas.

To this day, however, neither the government nor the district court – nor this court – has any idea what it is that defendant would have said from the stand. Moore neither filed his own affidavit nor proffered what his testimony would have been. He never said how it would have differed from his counsel's affidavits, or how it would have altered the district court's ruling. Repeatedly during oral argument on the motion, defense counsel deflected questions from the court about the grounds for the motion, insisting that the court should allow the defendant to answer the questions himself from the witness stand. Counsel never said what defendant's answers would be or what they would prove. He never disavowed his own affidavit testimony.

Under Fed. R. Crim. P. 32(d), a defendant does not have an absolute right to withdraw a guilty plea, even before sentencing. *United States v. Rica-Ortiz*, 830 F.2d 1067 (9th Cir. 1987). Rather, a defendant bears the burden of demonstrating to the district court's satisfaction that a "fair and just reason" supports his request to withdraw. Fed. R. Crim. P. 32(d); *United States v. DeFreitas*, 865

F.2d 80, 82 (4th Cir. 1989); *United States v. Haley*, 784 F.2d 1218, 1219 (4th Cir. 1986). The determination is entrusted to the discretion of the district court.

Nor does a defendant automatically get an evidentiary hearing as a matter of right whenever he seeks to withdraw his guilty plea. *United States v. Thompson*, 680 F.2d 1145, 1151-52 (7th Cir. 1982), *cert. denied*, 459 U.S. 1089 (1982). Nevertheless, it is well settled that "evidentiary hearings should be liberally granted prior to sentencing." *United States v. Fountain*, 777 F.2d 351, 358 (7th Cir. 1985); *see also, e.g., United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982). Still, that hearing need only be granted "when a 'fair and just reason' for withdrawal of the plea is presented." *Fountain*, 777 F.2d at 358, *quoting Thompson*, 680 F.2d at 1152. No such showing has been made here, and the denial of Moore's request for a hearing was within the district court's discretion.

Courts typically consider a variety of factors in determining whether a defendant has met his burden under Rule 32(d). The factors include (1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary, (2) whether the defendant has credibly asserted his legal innocence, (3) whether there has been a delay between the entering of the plea and the filing of the motion, (4) whether defendant has had close assistance of competent counsel, (5) whether withdrawal will cause prejudice to the government, and (6) whether it will inconvenience the court and waste judicial resources. *See, e.g., United States v. Hurtado*, 846 F.2d 995, 997 (5th Cir.), *cert. denied*, 109 S.Ct. 163 (1988); *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *United States v. Kobrosky*, 711 F.2d 449, 455-56 (1st Cir. 1983).

None of the above mentioned six factors seems dispositively to favor defendant here. First and most importantly, Moore, a lawyer and former governor assisted by competent counsel, was simply not convincing in claiming that the Rule 11 plea was not knowing and voluntary.

Second, the defendant never made credible assertions of his innocence. Rather, he took issue with some of the details of the government's version of events and their characterization; for ex-

ample, he seeks to make something of fact that what was called in the version "extortion" was in act a "bribe."

Third, Moore long delayed between the time of the pleas and the time of entering the motion to withdraw guilty pleas. He waited six weeks before giving notice of his intent to move to withdraw his pleas.

The fourth factor, inadequacy of aid of counsel, is not persuasive. Competency of counsel is not questioned. As to the fifth factor, although the government does claim prejudice, the U.S. Attorney has not made a particularly strong showing in that respect. Despite the weakness in the government's presentation on the issue, these factors are only balancing considerations, and so the lack of prejudice to the government, in and of itself, is not dispositive.

Finally, a reopening of the plea would have been futile. There was no substance to Moore's claims. It would be pointless, perhaps even unjust, to allow him to relitigate. Despite the policy in favor of liberally granting evidentiary hearings prior to sentencing, Moore has not presented a "fair and just reason" for the withdrawal of his plea. It was, thus, a no abuse of discretion for the district court, in the circumstances, to deny him the hearing.

II.

Rule 11(e)(2) requires "disclosure of the [plea] agreement" to the district court at the time a guilty plea is taken. The Rule is properly read to mean that all "material terms" (or material "details" or "elements") of the agreement must be disclosed. *United States v. Daniels*, 821 F.2d 76, 79 (1st Cir. 1987); *United States v. Blackner*, 721 F.2d 703, 708 (10th Cir. 1983); *United States v. Roberts*, 570 F.2d 999, 1005, 1007 (D.C. Cir. 1977). The purpose of the requirement is to enable the district court to probe the defendant's understanding of the consequences of his bargain, and the voluntariness of his entering it. *Daniels*, 821 F.2d at 80.

Rule 11(f) places a heavy burden on the court to insure that there is a basis for the plea. The rule states that

> [n]otwithstanding the acceptance of the plea of guilty, the court should not enter a judgment upon such plea without

> making such inquiry as shall satisfy it that there is a factual basis for the plea.

The district court's inquiry into the factual basis of a plea must be searching and not merely *pro forma*.

Moore has contended that the parties failed to disclose to the district court one of the material terms of his plea agreement. The undisclosed term was supposedly comprised of the government's last-minute concession, on the morning that Moore entered his guilty pleas, that it would not file a detailed written statement of facts with the court, but would instead make a more limited oral proffer of the pleas' factual basis. From that flows the argument that abandonment by the government on May 8, 1990 of its plan to file the written statement was actually a material term of his April 12, 1990 plea agreement. Moore has further sought to contend that the parties' failure to inform the district court of the decision to file the written statement undercut the Fed.R. Crim. P. 11 proceedings and invalidated his pleas.

Responding, the government has asserted that the reason it never occurred to anyone to tell the district judge about the written statement is that it was irrelevant to Moore's underlying agreement to plead guilty. Rule 11 requires disclosure of only the material elements of the plea agreement.

Here, the terms of the plea agreement are set out in the document signed by the parties on April 12. The agreement recites the terms and conditions contemplated by Rule 11 — that the defendant had received no promises about his likely sentence, and that the government would recommend no specific sentence, although it reserved the right to allocute at sentencing; and that the government would bring no other charges against the defendant. The statement further recited that "[t]his written agreement constitutes the entire agreement between the United States and Mr. Moore in this matter." There is nothing in the agreement that would indicate anything with even the hint of unconscionability. It is reasonable that Moore was required to abide by his word. The attempt of the parties to work out a detail as to how the government would state the factual basis of its case (no error having been called to the court's attention) had little to do with the plea agreement, or the concerns underlying Rule 11.

On May 8, 1990, just before the proceeding in which Moore entered his pleas, the government acquiesced in the defense counsel's demand that the government proffer its factual basis in a more limited version than it had proposed filing. That did not materially concern the government's position at sentencing, the voluntariness of the defendant's decision to plead guilty, or the existing plea agreement. It did not affect the court's obligation under Rule 11, it had little effect on the factual basis for the plea, and it did not change the fact that defendant was truthfully admitting his guilt. It was the working out of an objection from defense counsel, not over whether the defendant was willing to admit his guilt to the crimes charged, but over how much of the government's evidence he was willing to acknowledge publicly to be true, and in what detail.

At oral argument on the motion to withdraw the pleas, the district judge said that knowledge of the discussions would have caused him to do nothing differently. He concluded that the question of how the government would present the factual basis for defendant's pleas was not a material part of the plea agreement, and that the parties' not telling him about it did not violate Rule 11. That finding is not clearly erroneous.

III.

It is settled law that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santabello v. New York*, 404 U.S. 257, 262 (1971). When the government fails to adhere to the plea agreement in any way, the sentence must be vacated and remanded to the district court either to allow the appellant to withdraw his plea or grant specific performance of the plea agreement. Id. at 263. That is the case even if the judge assures that he was not influenced in his sentencing by the procecutor's recommendation. *United States v. Crusco*, 536 F.2d 21, 26 (3rd Cir. 1976). Moore has sought to establish that there was departure by the government from the terms of the plea agreement.

It is settled that the defendant is entitled "to the enforcement of the agreement which he entered into with the government and which was the inducement to his guilty plea." *United States v. Reckmeyer*,

786 F.2d 1216, 1223 (4th Cir.), *cert. denied*, 479 U.S. 850 (1986). *See also Santobello v. New York*, 404 U.S. 257, 262 (1971).

Paragraph 9 of the plea agreement provided, in pertinent part:

> It is understood that the matter of sentencing is within the sole discretion of the Court and the United States will make no recommendation as to a specific sentence. However, the United States retains the right to inform the probation office and the Court of any relevant facts, to address the Court with respect to the nature and seriousness of the offense, to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report and to respond to any statements made to the Court by or on behalf of Mr. Moore.

Nevertheless, Moore has claimed that the "spirit" of the plea agreement was violated because the United States sought a "severe prison term" and made "a transparent effort to influence the severity' of Moore's sentence." The plea agreement, however, did not restrict the prosecutors as he suggests and, given the sophistication of both defendant and counsel, the argument of plea agreement violation is without merit.

Defense counsel has made the argument that the "spirit" of the deal was violated. In the case of an unsophisticated or under-represented defendant, we might be inclined to take a less literal view of the terms of the plea agreement, but there is no adequate reason why Moore, represented by very able counsel, should not be held to his word. Governor Moore did not have a reasonable basis to believe that the prosecutor's promise to refrain from recommending a *specific* sentence protected him from remarks calculated to induce the Court to issue a *severe* prison term.

The judgment, accordingly, is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

VS.

ARCH A. MOORE, JR.,

Defendant.

CRIMINAL ACTION NO.
2:90-00078

Proceedings had in the hearing of the MOTION TO WITHDRAW THE GUILTY PLEAS before Honorable Walter E. Hoffman, Judge, on Monday, July 9, 1990, at Charleston, West Virginia.

APPEARANCES:

On Behalf of the United States of America:
JOHN M. CAMPBELL, ESQUIRE
Trial Attorney, Public Integrity Section
U.S. Department of Justice

JOSEPH F. SAVAGE, JR., ESQUIRE
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Assistant United States Attorney

On Behalf of the Defendant, Arch A. Moore, Jr.:
WILLIAM G. HUNDLEY, ESQUIRE
and
LARRY S. GONDELMAN, ESQUIRE
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The Defendant, ARCH A. MOORE, JR., was present in person.

PROCEEDINGS (1:32 p.m.)

THE COURT: Have a seat, ladies and gentlemen.

THE CLERK: United States of America versus Arch A. Moore, Jr., Criminal Action No. 2:90-00078. Will counsel please note their appearance for the record.

MR. HUNDLEY: It is William G. Hundley for Mr. Moore, and I would like to introduce the Court to my partner and associate, Mr. Gondelman here, who is in here in line with your judge's order.

THE COURT: Yes. I received your message that he would be here and I think that is fine.

MR. CAMPBELL: Judge, John Campbell for the United States from the Department of Justice. With me here are Assistant United States Attorneys Larry Ellis and Joseph Savage.

MR. SAVAGE: Good afternoon, your Honor.

THE COURT: Thank you, gentlemen.

Gentlemen, in the order that I entered convening this session, which I believe was entered on July the 3rd — I don't know, it was filed later, I guess, July the 5th — I gave to both Mr. Moore and Mr. Hundley the opportunity, if they so desired, to get a divorce, if I could word it that way. I received through my law clerk a message from Mr. Hundley stating that he had no intention of terminating his services representing Mr. Moore, and assuming that to be still in effect, Mr. Hundley, I would like to ask Mr. Moore at this time whether or not he wishes to exercise any privileges along that line. I had received no information to that effect, although I provided that I should be immediately notified if that — any authority along those lines.

MR. HUNDLEY: I'll let Mr. Moore speak for himself. I want to confirm that I have no intention to withdraw, your Honor.

THE DEFENDANT: Your Honor, I certainly intend that Mr. Hundley continue as counsel in my case. I am very much appreciative of the Court's offering me the opportunity to review the circumstances, but I want to represent to the Court, Mr. Hundley is my counsel.

THE COURT: Of course, I cannot speak for anyone else, Mr. Moore, but having given you this opportunity, if it is not — if you do not avail yourself of the opportunity, it may well be that at some later

date before some other court or panel of the court, they could quite properly say to you, "Judge Hoffman gave you the opportunity to claim ineffective counsel if you wanted to, and you told him you didn't want to." You understand that, do you not, that it might be a bar to you later on?

THE DEFENDANT: I understand that, your Honor.

THE COURT: All right, thank you, sir.

All right. Well, if there are — if there is nothing further, then, gentlemen, we will hear Mr. Hundley on the motion.

MR. HUNDLEY: Thank you, your Honor.

Your Honor, what I had done, your Honor, I have prepared a second affidavit from myself. I have shown the affidavit, my affidavit, to the Government. After talking with your Honor's secretary, I have brought the affidavit down here pursuant to the Court's thinking, with which I agree. I believe very strongly that my first and now my second affidavit, the contents of it, provide the basis for an evidentiary hearing on my motion.

In addition, I want to now say to the Court that in that connection, it would be my intention to call Mr. Moore and have Mr. Moore give sworn testimony to the Court on this point. It appears very strongly to me, your Honor, that you have heard from me in my affidavit. And I am certainly willing to testify under oath as to any questions the Government wants to ask me, but it appears to me that the Court would also be very much interested in hearing from Mr. Moore. I am prepared to put Mr. Moore on the stand if the Court so rules that I have made the necessary showing and whatnot. I had asked in that connection — I had said —

THE COURT: Well, I mentioned in the order that if I reach that conclusion that an evidentiary hearing was necessary, I would have — would hear it.

MR. HUNDLEY: Yes, sir.

THE COURT: But aren't we — aren't we putting the cart before the horse?

MR. HUNDLEY: Well, I just want the Court to know that in advance, yes.

THE COURT: I mean, in other words, I have read through this transcript of the proceedings on May 8th, Mr. Hundley, and with the exception of one error that I made on page 7 in which I referred to him as serving as Governor of Virginia – and I may have made that mistake. I don't know, it certainly appears in the record, but I don't think any of us are shocked by that. I may not have made that mistake for all I know, but it obviously – no one picked it up at that time and except for that, this transcript – I want you to tell me what's the purpose of why we federal judges have to go through with all of these pages, some 36 pages of questions and answers to a defendant who wishes to plead guilty. When I came on the bench in 1954, all I did was ask them whether they wanted to plead guilty; and if they said yes, that was the end of it. Now, congress or the appellate courts or others have said we have got to go through this rigamarole, to which Mr. Moore went through it under oath, and I'm – I'm perfectly willing to hear him, but I'm not going to put the cart before the horse.

MR. HUNDLEY: I understand, your Honor.

THE COURT: He has got to show and you have got to show why I should hear him when the Fourth Circuit has repudiated their prior decisions. They had the *Savage* case, it is not named after Mr. Savage here, but the *Savage* case held, of course, that a defendant had an absolute right to withdraw his plea of guilty in any criminal case unless the Government could show that it would be prejudiced by reason of that. Well, that was such an abominable decision that the Federal Rules Committee made certain changes in it; and now the Fourth Circuit cases have all recognized that the *Savage* case is no longer the law, and that it is incumbent upon a defendant who comes before the Court and pleads guilty and answers all of these questions that seem to me that when they started out, they seemed to me to be very foolish. Now, I'm impressed, perhaps, that there may be a reason to have us ask all these questions. In other words, who is doing the playing of fast and loose with the judicial system? Is it the defendant who says, "Yes, Judge, I'm guilty," and then he turns around later and says, "I'm not guilty," and that later time is many, many weeks after he has plead guilty. And when Mr. Moore pleaded guilty on May the 8th, whatever he now complains of took place before April the 13th. And –

MR. HUNDLEY: Your Honor, excuse me, sir, I'm –

THE COURT: You knew about it. Mr. Moore knew about it. I didn't know about it. And now I want to know.

MR. HUNDLEY: All right.

THE COURT: Why — why should any member of the judiciary let anyone play fast and loose with the system? With that, my remarks are concluded and I'll hear your argument.

MR. HUNDLEY: Your Honor, your Honor, the rule indicates that the motion shall be granted where fair and just reasons —

THE COURT: Fair and just reasons. Now you give me the case that you're relying on.

MR. HUNDLEY: All right.

THE COURT: That after a person has gone through what I went through with Mr. Moore, and considering all of the delays in this one that have occurred since the complaint was made, I have forgotten the exact date.

MR. HUNDLEY: The indictment, sir?

THE COURT: I know that you phoned my office, if I could have a calendar, I believe I could — do we have one there? Here comes one.

MR. SAVAGE: It is a little small.

THE COURT: You phoned my office on the afternoon, the late afternoon of June the 19th, I believe, Tuesday, June the 19th.

MR. HUNDLEY: That's correct, sir; yes, sir, and advised you.

THE COURT: And that was the first information that I had that there would be a request for a withdrawal of the plea.

MR. HUNDLEY: That's correct, your Honor.

THE COURT: You didn't file the motion until the afternoon of June the 26th, I believe. Is that correct?

MR. HUNDLEY: Yes, I believe we —

THE COURT: Tuesday, June 26th.

MR. HUNDLEY: The motion was actually filed that date; yes, sir.

THE COURT: And I had just enough time to read it before — I guess you knew I was going into captivity there in the Greenbrier Hotel.

MR. HUNDLEY: I think, your Honor, we faxed you an advance copy.

THE COURT: You faxed it and I got it and I read it through, and then I had to leave the next morning to go to White Sulphur from Norfolk.

MR. HUNDLEY: Yes, sir.

THE COURT: And once you get up there, you can't think of anything but the bills, and so there was nothing I could think about while I was up there. And the first real attention I gave to it was on Monday, July 2nd. And I have gone through it then and I read the Fourth Circuit cases on withdrawal. And they have gotten just the very opposite of what they were in the *Savage* case. They have gotten tight.

MR. HUNDLEY: All right. Your Honor, I have been practicing criminal defense law ever since I left the Department of Justice in 1966. And this is the first time that I have ever filed such a motion. And I have plenty of defendants.

THE COURT: I understand you filed it at the request of your client and that is perfectly all right.

MR. HUNDLEY: And I very strongly believe in this motion.

THE COURT: Well —

MR. HUNDLEY: As I very candidly admitted in my affidavit, that there are certain things that I genuinely wished I had done differently. And I think that's a fact.

THE COURT: Well, I don't see where the authorities support you on it, do they?

MR. HUNDLEY: Well, first, your Honor, if you would, I believe we have submitted to your Honor certain Circuit cases, not Fourth Circuit cases, I will grant you that one. I believe one was a Tenth Circuit case.

THE COURT: One was written by me back in 1981 in Chicago when I was sitting out there.

MR. HUNDLEY: That is right; that is right, yeah.

THE COURT: But that was prior.

MR. HUNDLEY: That is when you anticipated the change that ultimately happened.

THE COURT: In 1983, I think it was, the Rules Committee made changes in this. They changed the language to fair and just.

MR. HUNDLEY: That's right.

THE COURT: Now, what is fair and what's just about this one?

MR. HUNDLEY: All right, if I may, your Honor, and I will try to state it as succinctly as I can; and I will with the Court's permission go back to the facts, particularly the rejoinder that the Government made in their affidavits to my motion, because I believe that there are factual discrepancies. And I believe they have omitted to state an awful lot.

THE COURT: As to any factual discrepancies that exist, if they are pertinent to the question involved, I think it is my duty, then, to at least resolve those matters.

MR. HUNDLEY: All right. The first one, your Honor, is that they point out with some accuracy that we had signed various waivers of the statute of limitations. And it is true that I knew in a general way that the Government, at least the prosecutors down here in West Virginia, were going to try and indict my client. And I, in fact, asked for and received several conferences in Washington with the Public Integrity Section, the Tax Section, the Organized Crime Section, because they handle RICO; and it is true that in those conferences I brought up the various defenses that I thought I had. But, your Honor, they omit to state in any of their papers that there was one charge and one factor that was being consciously concealed from me.

THE COURT: Are they under any obligation to tell you?

MR. HUNDLEY: I am not saying they are, your Honor. They are not under any obligation.

THE COURT: Did you ask them whether there was only one charge?

MR. HUNDLEY: I, specifically, at one of the conferences that I set forth in this affidavit, when I was in Washington with the Deputy Chief of the Public Integrity Section, all of the prosecutors were present. My recollection is this was late in March or the very beginning of April when they brought up to me, they said to me, "Mr. Hundley, have you given any thought to any plea negotiations in this case?" And I said to all of them, I said, "Gentlemen, I haven't heard, you know, anything from you people yet in our many, many discussions that would lead me to initiate any plea discussions."

Now, your Honor, I most respectfully submit that it was very, very carefully orchestrated by the prosecution that they were going to get maximum impact on me, William G. Hundley, by waiting until the last minute, which was on April the 9th, excuse my client, sit me down in a chair, and say, "Now, Mr. Hundley, we want you to know that we have recorded and videotaped your client's meeting with Mr. Leaberry on the 8th, the 9th, and the 11th. And in addition to that, we have recordings of Mr. Kizer and your client."

And let me tell you, your Honor, that did have quite an impact upon me because some time during that period, 8th, 9th and 11th —

THE COURT: Well, perhaps your client didn't tell you the truth, then, all the way down the line.

MR. HUNDLEY: In any event, I respectfully submit to the Court that that was no accident, that I am being told the same day that they have the grand jury there ready to indict, you know, and that the Press Office in Washington has put out a statement, "Keep your eye on Charleston. Something newsworthy is going to happen that date."

THE COURT: You all practice through the press. They don't make much headway with me; but, when did you have your conference with the Public Integrity Section in Washington, D.C.? What date?

MR. HUNDLEY: My recollection is it was late March, sir. The Government, I believe, in their affidavit said it was April.

MR. SAVAGE: April 5th.

MR. HUNDLEY: April 5th. I would defer to that.

THE COURT: All right. Now, you had — the policy of the United States Government is, I know with respect to income tax

evasion cases, that they will almost universally invite counsel for a defendant in a criminal case, if known -

MR. HUNDLEY: Which they did to me.

THE COURT: Even in a case that was not even pending and before the indictment, and the policy is that they invite you in to confer if you want to confer. They don't make you come in.

MR. HUNDLEY: As a matter of fact, in this case, your Honor, the Tax Division invited me in, oh, I would say at least three weeks or a month before this meeting. But, there again, sir –

THE COURT: Well, did you take advantage of that situation?

MR. HUNDLEY: I took advantage of that. The Tax Division told me what the dollar amounts were. That's all. That's all. Everybody, everybody in Washington and down here except Bill Hundley knew about the meeting on the 8th, the telephone call on the 9th, and the 11th. Your Honor, I was down here at that time. For once, you know, they weren't – for whatever reason, for whatever reason, they weren't going to level with me about that. They had those tape recordings, your Honor, they had those on the 10th when we were interviewed down here. They could have told me any time.

THE COURT: They could have and they – they could have and had Mr. Moore been indicted by that time, they would have made available those tapes because they would have had to have made them available if I had been trying the case, I can tell you.

MR. HUNDLEY: What they did, instead, is wait until the very eve of indictment, then tell me.

THE COURT: You had a statute of limitations, and Mr. Moore had signed, had he not?

MR. HUNDLEY: Please, your Honor, again, that is wrong what they say in their affidavit. The statute of limitations here was never a factor. They never said it was a factor. When I came down on the 11th –

THE COURT: I'm not saying they said it was a factor. I asked you, was there not a statute of limitations question that would have arisen had he not been indicted by April the 13th as the last day?

MR. HUNDLEY: That is right; yes, sir. You are quite right.

THE COURT: And I can assure you that Mr. William Hundley would have taken advantage of it, and I don't blame you.

MR. HUNDLEY: Yes, your Honor. I only asked them to continue it until the 13th, Friday the 13th.

THE COURT: Yes, but you wanted to continue it until the very last date hoping against hope, as all lawyers do, that something would strike and –

MR. HUNDLEY: Your Honor, please let me respectfully disagree. If they had ever said to me again, "Will you sign another," I would have. I signed it in the plea agreement and everything else.

THE COURT: Did you ever offer to do it?

MR. HUNDLEY: I believe I did. Honestly, I did know – I didn't offer it because it never came up. I didn't.

THE COURT: All right.

MR. HUNDLEY: When I asked them, and this is in my new affidavit, when I asked them –

THE COURT: You couldn't have signed it anyway. Mr. Moore would have to sign.

MR. HUNDLEY: No, I would have to get Mr. Moore. We both would have to sign. When we asked them to continue this one day until the 13th, and I don't think I honestly focused then on the fact that that was the day the statute – but it was within the statute.

THE COURT: You tell me why you didn't tell me all of this when we were here on May the 8th. I remember the statement of facts was given and you got up and said, "It's substantially correct."

MR. HUNDLEY: Yes.

THE COURT: I said, "I don't like the words 'substantially correct.' I want to know," and then you said, "It would not in any way effect any plea, whatever."

MR. HUNDLEY: That was me.

THE COURT: And your client made the same statement.

MR. HUNDLEY: Legal defenses and whatnot.

THE COURT: Beg your pardon?

MR. HUNDLEY: That's right. I am not disagreeing with your Honor on that.

THE COURT: Why aren't you willing to tell me if you want to complain, if you want to complain on June the 9th — or July the 9th, why don't you complain on May the 8th?

MR. HUNDLEY: Your Honor, that's why I think it's very important for the Court to hear Mr. Moore. I, William G. Hundley, counsel, I never had any difficulty with the plea. I recommended the plea very strongly to my client. I thought it was very, very much in his best interest to accept this plea. I think where I was at fault is I substituted my judgment of the Government's evidence for my client's evidence. My client is the one that was never happy with the plea.

THE COURT: Did your client tell you before May the 8th that he insisted on pleading not guilty?

MR. HUNDLEY: Not that, your Honor, but that he always had serious, serious reservations about Counts 1, 2, 3 and 4, not the obstruction count.

THE COURT: Oh, of course, everybody has serious reservations whether they can be found not guilty. That is the thing, and I know exactly what happened in this case. He's got a lot of friends in the State of West Virginia, fine friends that are high up politically, perhaps; and I'm sure he has received a lot of advice since May the 8th. Somehow or another that advice, though, may be a little bit astray, perhaps. Those people don't know anything more about it.

You can get all kinds of free information, just like I get letters. I have had letters about Mr. Moore. I have sent them to the probation officer, wherever he is. He can vouch for the fact every one I received, some of which would like for me to execute Mr. Moore, which I cannot do. Others want me to put the congressional medal of honor around his neck, which I cannot do, and there you go. So, we all know how juries react. Some — you have got a good chance, get off. Why plead guilty? And I can understand that, but you can't play fast and loose with the judicial system, Mr. Hundley, and you know it and Mr. Moore knows it.

MR. HUNDLEY: Your Honor, I — you know, I respectfully submit, I would not have filed this motion if I thought I was playing

fast and loose with the judicial system. I would not have said the things in my affidavit.

THE COURT: Can you find –

MR. HUNDLEY: You know, it doesn't exactly make me look like Ed Meese.

THE COURT: Can you find any one authority that supports your contention –

MR. HUNDLEY: Yes.

THE COURT: – At this late stage?

MR. HUNDLEY: Yes.

THE COURT: – Because the client has changed his mind, that a judge should deal to him along those lines?

MR. HUNDLEY: Yes, we have this Tenth Circuit case that Mr. Gondelman will – but, your Honor, if I could complete my factual – which I think makes it much more pertinent.

Within, I would say, ten days or two weeks after the plea agreement was signed, as your Honor will remember, you mentioned it at the time of the plea, one of the things that we had agreed to in the plea agreement is that Mr. Moore would cooperate with the Government and would testify if necessary, et cetera, et cetera. Well, the Government at that time was very anxious to talk to Mr. Moore about his testimony in the *Ellis* case, which was a case that was pending at this time down here, as I remember.

And I remember I told, you know, Mr. Savage after the plea agreement had been signed, Mr. Moore was going to go away for a few days; but, you know, just as soon as he came back, I would make arrangements for the Government to interview Mr. Moore pursuant to the cooperating agreement and whatnot. And they did. I think that the date was some time in late April. It was about nine or ten days after the plea agreement was signed. That was signed on the 12th, as I remember it, the 11th or 12th. And I was not present at that interview because usually when you make your client available to the Government to cooperate, they would just as soon not have you there. They want to go in and talk to them and that is fine. I understand that. And

they did. They went over and they talked to Mr. Moore, several of them. And as they say, I was not present.

But right, right after that meeting happened, I got a call from Mr. Savage, who called me up and said, "Bill," you know, it was Bill and Joe, that, "we just talked to your client and he's not admitting anything except the obstruction of justice. He's denying Counts 1 and 2, 3 and 4 and whatnot." Now, Mr. Savage deals, you know, rather lightly with that in his affidavit. You know, he says look, he never said –

THE COURT: It doesn't make any difference. He had already pled, hadn't he?

MR. HUNDLEY: I know, your Honor.

THE COURT: Had he pled at that time?

MR. HUNDLEY: No, he hadn't pled and whatnot – yes, sir, that is correct. All right.

THE COURT: Well then, that's why I am asking you why in the world would he stand before me under oath and turn around and lie to me all the time?

MR. HUNDLEY: But, I really would like him to answer those questions, your Honor.

THE COURT: Huh?

MR. HUNDLEY: I think he should answer those questions to your Honor.

THE COURT: I'm – I have got –

MR. HUNDLEY: I would respectfully submit that he should be permitted to answer those questions.

THE COURT: I don't know Mr. Moore. I never saw him before May the 8th. I take it, though – somebody has gratuitously sent me a newspaper that said he is a law school graduate, isn't he? I don't know.

THE DEFENDANT: Yes.

MR. HUNDLEY: He said – excuse me sir.

THE COURT: He is a law school graduate, isn't he?

MR. HUNDLEY: Yes, sir; yes, sir.

THE COURT: Didn't he practice law?

MR. HUNDLEY: Yes, sir; yes, sir.

THE COURT: Well, of course, we get some mighty bad lawyers, I know, sometimes.

MR. HUNDLEY: If I can continue, your Honor.

The next event was your Honor had set the date of the plea as May the 8th.

THE COURT: Please keep your voice up. You are dropping.

MR. HUNDLEY: I am sorry, sir.

I came down the day before. I had agreed that we would have some kind of a short statement of the evidence that the Government was going to produce and that we would see if your Honor would accept that in in lieu of an oral allocution at the time. Well, in any event, you know, very late that night what they delivered to me was a very, very lengthy story about Moore with exhibits and the tapes attached to it and everything else, not too dissimilar from the memorandum that they originally filed the other day. And I have agreed that it should be withdrawn, you know, pretty much the same. And it was absolutely loaded with, I believe, critical facts that Mr. Moore would never, never admit.

THE COURT: I know what you are talking about, of course.

MR. HUNDLEY: Yes, sir; yes, sir.

THE COURT: But, when the statement of facts were made before me on May 8th, they didn't go into all that falderal that they wanted to go into in this memorandum, did they?

MR. HUNDLEY: I – I think that was the advice, your Honor, and I think that is where I was really at fault. I say it very candidly, your Honor, to the Court that I really believe that I was at fault on that occasion.

THE COURT: You believe what?

MR. HUNDLEY: That I was at fault, I was, Hundley, was at fault because I was trying, rightly or wrongly, I mean I was trying to save the plea.

THE COURT: You didn't think for one minute that you could get by me by presenting to me a statement of Mr. Moore in lieu of the questioning that is required under Rule 11 — did you think that I was that dumb?

MR. HUNDLEY: No, sir; but what I should have done and, honestly, I have the highest respect for this Court. I always have. What I should have done, what I should have done, that even when the Government agreed, even when the Government agreed to withdraw this novel on Arch Moore with all of the facts that we objected to, what I should have done — they didn't advise me that they were withdrawing it until 8:30 the morning of the plea. But what I should have done at that time is, with the Government, I should have come in. I should have asked to see your Honor before the hearing and whatnot and said, "Judge, these are all the problems that we are having with Counts 1, 2, 3 and 4. He has denied so many of the basic, material facts. I want to bring those —" I had a duty, I believe, to bring that to the Court's attention. I regret, genuinely, that I did not.

THE COURT: You didn't mention it to me. And the only thing I can say is that that gets into that statement where I asked you and Mr. Moore whether the factual statement of the plea was correct and asked whether you had any additions, deletions or anything. And you said, "Well, it's substantially correct." And I am a little bit familiar with that word and I didn't like it too much and so I said, "What about substantial? What do you mean?" And then it was, you said, "Well, Judge, it will not effect any plea." Now, what in the world is a judge going to do when you have a perfectly reputable lawyer from Washington, D.C. who has had far more experience in these cases than I would ever have, and you make a representation to me like that, should I accept it?

MR. HUNDLEY: Well, I believe that there is case law that we have submitted to your Honor in our memorandum, and I'll let Mr. Gondelman, who did the legal work, which says that where there are agreements and factors like this and there is a plea agreement involved, it's not only incumbent upon the defense counsel —

THE COURT: There is nothing in the plea agreement.

MR. HUNDLEY: But it is incumbent upon the Government so that the judge is not kept in the dark, so that the judge knows all of these problems.

THE COURT: You don't even need a plea agreement in any criminal case. There is no requirement that you have to have a plea agreement when a person is pleading guilty.

MR. HUNDLEY: That's right.

THE COURT: It's just something that the defense bar and the Government has adopted. The Government adopts it because they don't want to face dropping the charges that they, obviously, do drop from time to time without some written explanation. And the defense bar hopefully feels that by getting counts dropped and so on, why, they can persuade the judge to give a lower sentence. And I don't blame them a bit. I think that's the duty of the defense bar, but that does not answer my question. You want to put Mr. Moore on this stand now –

MR. HUNDLEY: Yes, sir.

THE COURT: – To tell me that neither he nor you told me the truth when you said – and you said it right in this record. I'll read it to you if you want me to.

MR. HUNDLEY: No, I just read it. You asked me if there were any defenses.

THE COURT: I said, "What do you mean by substantial," and you said, "Well, all I can say, Judge, is that it will not effect any plea that is made."

MR. HUNDLEY: That is correct. You also wanted to know if I thought there were any legal defenses.

THE COURT: Any legal defenses.

MR. HUNDLEY: What I am saying, your Honor, and – is that I didn't have a problem. This is me, Mr. William G. Hundley. I didn't have a problem with the plea. I had strongly recommended it. I thought it was really in his best interest. What I'm telling you, and in which I knew and, perhaps, in that respect I was not totally honest with the Court.

THE COURT: If that is the case –

MR. HUNDLEY: I knew my client was having a problem.

THE COURT: If that is the case, I have got to take each one of your clients from now on and individually cross-examine them to make sure they know what they are doing. A judge should not do that, Mr. Hundley.

MR. HUNDLEY: Your Honor, I told you it is the first time in my whole career that I have ever filed such a motion because I think there are compelling reasons of fairness and justice.

THE COURT: The filing is based upon the ineffective counsel, then.

MR. HUNDLEY: If that is the Court's –

THE COURT: And Mr. Moore says he doesn't want to discharge you and you are not willing to withdraw.

MR. HUNDLEY: I filed the motion. I am not willing to withdraw, that's correct. I believe in this motion.

THE COURT: I say, but you are not willing to withdraw in the case so that you could testify. If this is your fault, your client knew it at the time, didn't he? He is a lawyer and he's a highly intelligent man and he certainly ought to know what he is doing.

MR. HUNDLEY: Your Honor, I have an affidavit here where I say all –

THE COURT: Let's see the Tenth Circuit case that you are referring to. I read through all of the Fourth Circuit cases. I may have it here.

MR. GONDELMAN: Yes, Judge. The case that Mr. Hundley is referring to is *United States versus Blackner* at 521 F.2d 703.

THE COURT: Oh, 521 F.2d goes back in the days when I was born.

MR. HUNDLEY: I'm sorry, 721, that is a mistake, 721, 703. It is 1983 case after the changes in the rules.

THE COURT: Well, what date was it in 1983?

MR. GONDELMAN: November.

THE COURT: Do they refer to the rule change?

MR. GONDELMAN: I want to just check that, Judge.

THE COURT: A 1983 decision for a rule change that might have taken place in 1983 would not impress me as probably one where –

MR. GONDELMAN: Well, Judge, yet I understand that the essence of what a major part of our argument here today, and this is what this case directly goes to and it's not affected at all by the rule change even if it was before, is that when the Government or the defendant or both, as in this case, fail to bring to the Court's attention some element – some promise that was made in the course of the plea negotiations that, in essence, undermines the plea. It's a violation of Rule 11 and it is the new Rule 11 that they are talking about here. It is a violation of the rule because not all of the representations of the plea bargain have been made available to the Court as required by the rule.

THE COURT: What is there in Rule 11 that says you have to cover the entire conferences between counsel in preparing the plea agreement?

MR. GONDELMAN: What the *Blackner* case interpretation of Rule 11 is, is that the parties are required to inform the trial judge of all, all the promises that have been made, not only those which they, the Government, defense counsel, happen to consider important.

THE COURT: What promises were not divulged to me that resulted in the promises? I don't know.

MR. GONDELMAN: There were two things that weren't divulged to your Honor that undermine this plea. Number one is that the Government agreed to withdraw the statement of facts that they had delivered to Mr. Hundley the night before and they knew that –

THE COURT: But that is part of the plea negotiations.

MR. GONDELMAN: That's right. And they didn't – but what the *Blackner* case is saying if that is – this was, obviously, an important issue with the defendant and with Mr. Hundley because Mr. Hundley told the Government that –

THE COURT: Well, you don't – you and I don't agree on what plea negotiations mean. I assume that the defendant is going to get the best that he can possibly get for himself. And I would assume that the

Government in many instances is going to try to exact more than they can.

Somewhere down the line they get together by the Government giving some, the defendant giving some. If a judge had to go through all of this — I spent one year arguing this thing before the various circuits. Judge Lambrose from Cleveland, Ohio, was a very great believer and we are warm, personal friends, and you can check it with him. But we are — he is a great believer in the fact that the judge ought to be in on the bargaining. That is, the plea bargaining expressly stated in Rule 11 is a separate sentence which says that the judge shall not engage in any plea bargaining for the very reason that we are now talking about under that case that you are citing, apparently. If you think that is good law that the judge ought to get into the plea bargaining, why, then, you will have to start making your complaint against Rule 11.

MR. HUNDLEY: We are not saying that, your Honor. We are saying that if there are outside factors that pertain to the plea agreement, such as what happened on the night of April the 7th, that those — we had an obligation to bring that to your attention.

MR. GONDELMAN: It was a material — I'll tell you, Judge, the reason —

THE COURT: There is no obligation on the part of the Government once the plea agreement is signed. That's the plea agreement signed and approved by the defendant and counsel and by the Government. That's the plea agreement.

MR. GONDELMAN: Judge, excuse me. The reason that this is so important is that if the Government or Mr. Hundley, as he stated he wished he had done, had come to you that morning and said, "Judge, here's a statement of facts that the Government wants to proffer to your Honor. We have grave problems with that. And we don't —"

THE COURT: And I would have sent you out and said —

MR. GONDELMAN: Exactly.

THE COURT: — That Rule 11 says I shall not participate in any plea bargain. If you are coming here —

MR. GONDELMAN: It is not.

THE COURT: – Before me –

MR. GONDELMAN: It is not a question of – we would not have been there asking your Honor to participate in plea bargaining. What we would have been informing your Honor is that there is a material disagreement that the Government has promised not –

THE COURT: Let me see that, Counsel, if you will, please.

MR. HUNDLEY: Yes, sir.

(Handing to the Court.)

THE COURT: Is that the strongest case that you rely on to support your claim?

MR. GONDELMAN: It is widely adopted – the language in that case is quoted in a First Circuit case, *United States versus Daniels*, and a D.C. Circuit case, *United States versus Roberts*. The *Daniels* case is a 1987 case, Judge. And it directly – they directly – the *Daniels* case quotes the *Blackner* case.

THE COURT: Have seats if you wish, gentlemen.

MR. GONDELMAN: Judge, I would also tender to the Court a copy of the *Daniels* case, which is a later case. Highlighted is the relevant portion of it.

THE COURT: All right, let me take a ten-minute recess.

(Recess at 2:25 p.m. until 2:35 p.m. Same parties present.)

THE COURT: Gentlemen, I have read the case of *United States of America against Blackner*, 721 F.2d 703, a decision by the Tenth Circuit in 1983. That is a case in which, as I understand it, neither the Government nor the defendant told the Court what was in a plea agreement that had been agreed to by the parties. And the same is true as to the First Circuit case, *United States against Daniels*, 821 F.2d at page 76, decided in 1987, in which leave was granted to this fellow Daniels to withdraw his plea because the Court at the Rule 11 hearing said that it had been made clear to Daniels that the Court wouldn't accept the plea of guilty from his two codefendants unless he also pleaded guilty. If I did anything like that, I'll have to confess error, but I don't remember anybody else's involvement in this case other than Mr. Moore.

MR. GONDELMAN: That is correct, Judge. I think the *Daniels* case, though, is on point, and if I may explain. In the *Daniels* case, what it was, it involved a wire – what they call a wire plea. The Government had told Daniels that his brothers, I believe they were, or two other codefendants, would only be permitted to plead guilty if he pleaded guilty. That fact was not told by either the defense attorney or by the Government to the judge.

THE COURT: The *Daniels* case refers to Rule 11(e)(2) and says that this requires, "...disclosure of the plea agreement." We have got a plea agreement in this case, and it was discussed and brought to my attention on May the 8th and is somewhere in the record. I don't know where it is, but I don't have it.

MR. GONDELMAN: Judge, in essence, what we are saying to your Honor is that plea agreement included an additional term that your Honor was not informed of. And that term was that if the Government insisted on filing that 28-page written proffer of facts to the Court, that the defendant would not go through with the plea. And the Government said, "Okay, in essence, we will incorporate that into our agreement and we will not file that with the judge." And that's what happened. It was a term that modified. It was made clear explicitly.

THE COURT: I have to add, that had not been represented to me that way by either Mr. Hundley or the Government.

MR. GONDELMAN: I believe Mr. – I believe Mr. Hundley's first affidavit does state that, Judge.

THE COURT: Well, I have it up here somewhere.

MR. GONDELMAN: I believe in his first affidavit on page 3, paragraph 10, Mr. Hundley states, "Prior to the entry of the plea, I agreed that the Government could submit to the Court a written statement of the evidence the Government would present to prove the charges in the indictment in lieu of an oral allocution at the plea. It was not until 10:00 p.m. the night of May 7th, the night before the plea, that the Government presented me with a 26-page statement of purported facts, plus exhibits and transcripts of the recorded Moore-Leaberry January 8th meeting. I advised the Government that the statement was full of purported facts to which Mr. Moore would never

agree; and unless the Government withdrew the statement and made a simple, short, oral allocution at the plea, I was going to request a meeting with the Court the next morning to inform the Court that there would be no plea."

THE COURT: Well, that's all they did. They presented a statement of facts.

MR. GONDELMAN: And nobody told your Honor that they had agreed not to present a written statement.

THE COURT: If they had, I would have said, "It is none of my business what you gentlemen talked about. It's not any of my business."

MR. GONDELMAN: It is not part –

THE COURT: It is a question of what was agreed to, not what the parties discussed.

MR. GONDELMAN: I think, Judge, if I may, it's exactly what happened in the *Daniels* case where the Court was not informed of what was discussed.

THE COURT: And that was in the agreement, though.

MR. GONDELMAN: No, it wasn't.

THE COURT: They had agreed – they had agreed, then.

MR. GONDELMAN: It was a fact that was not presented to the Court in any manner, shape, or form; and it was the fact that it wasn't presented to the Court that caused the Court of Appeals to reverse.

THE COURT: Well, good luck in the Fourth Circuit.

MR. HUNDLEY: Your Honor –

THE COURT: Because on that point if you are correct, then judges have to forget Rule 11 and engage in the bargaining process. We would have to come out here where – well –

MR. HUNDLEY: Your Honor –

THE COURT: I almost claim now I have been out here so much that I ought to get an honored citizenship in West Virginia, but it's utterly ridiculous to say that a judge should go into the bargaining processes. Now, whatever they agreed to is a different thing.

MR. GONDELMAN: But that's what we have.

THE COURT: If they agreed not to present it to me and not to put it in the plea agreement, I didn't get it. And, of course, I wasn't entitled to know it.

MR. HUNDLEY: But we think you were, your Honor. I think with all due respect, your Honor's position is that if there is a proper inquiry, a proper Rule 11 inquiry, which I concede there was in this case, your Honor, that that forever forestalls the withdrawal of a guilty plea. How are you going to have your –

THE COURT: I don't think it forever forestalls it, no, because there may have been acts of fraud by the parties that might have upset it. Mr. Hundley, how much more time do you want to argue the matter?

MR. HUNDLEY: About five minutes, your Honor.

THE COURT: All right, have a seat, Mr. Gondelman.

MR. HUNDLEY: Your Honor, in a nutshell our factual position and our theory is that on the first opportunity that Mr. Moore had to disavow the plea agreement, that was about nine days after it was signed. That was the first time he came back in town and he met with the Government. He disavowed it at that time. That, coupled with the pressure at the time of the plea agreement itself and more importantly what happened, what happened on the night before the plea went down, and my honest admission to this Court that I believe I had an obligation under the law before I advised him to go ahead with the plea to come in and tell your Honor about all of these problems that we were having, I believe, your Honor, I believe – I can only believe because I didn't do it – I believe that if I had come in and told your Honor about this disavowal a few days after the plea agreement, the problems on the night before, what he was denying and not denying, that I believe what your Honor would have done is gotten him in and probably asked something to the effect that, "Now, Mr. Moore, will you, you know, tell me in your own words what you did wrong."

THE COURT: All I am saying is you were at liberty to plead not guilty – that Mr. Moore was at liberty to plead not guilty. Nobody was forcing him to plead guilty.

MR. HUNDLEY: I believe that's what would have happened if I had come in that morning.

THE COURT: That is all right.

MR. HUNDLEY: I believe that would have happened. I think that all of the reasons that I have set out and set out in more detail in this second affidavit, which I'm sure, you know, I would like to make this a part of the record. I'm sure the Government, I think, agrees with a lot of it —

THE COURT: I'll let you file that affidavit. I haven't seen it as yet, of course.

MR . HUNDLEY : I would, again, say that upon this showing that I have achieved the necessary threshold to have an evidentiary hearing because I think it is very important for my client, Mr. Moore, to answer the questions directly and under oath which you have posed to me. I have answered — I am willing to testify, to put all of this under oath. I have got an affidavit and written what I think I did right, what I think I did wrong. I have said that I didn't have a problem with the plea. I have honestly told the Court that I believe my client always did have a problem with the plea.

I have honestly told the Court that I have very strongly advised my attorney (sic) to go through with this because I honestly did feel that it was in my client's best interest. I believe that I have in large measure substituted my judgment, you might say, of the strength of the Government's case for my client. I make no bones about the fact, and I hope the Government doesn't take umbrage, but I think the Government knew that by concealing from me — and I'll grant your Honor is correct, that they had no obligation. They could have just gone ahead and gotten the indictment. They didn't have to tell me about the recorded conversations and whatnot, but they maximized it. They maximized it by hitting me with it the eve, the very, very eve of the indictment. They knew how I was going to react to that. I mean, I — you know —

THE COURT: They treat me the same way. Don't worry, Mr. Hundley.

MR. HUNDLEY: Well, I am only saying this, your Honor, because I am really trying to do what I honestly feel is right for my client. Your Honor, it was not easy. I have never — I have been in plenty of situations where clients have wanted to withdraw their guilty

pleas and I always send them to another lawyer. I am sure, your Honor, most of us in private practice, I don't think that filing this motion makes Bill Hundley look like the greatest lawyer in the world. I gave that is lot of thought and I decided to file this motion because I think they – not only are they fair and just, I think they are compelling reasons.

And I'll just finish because I don't want to wear out my welcome if I haven't already, Judge, that I believe I have presented a sufficient factual basis for an evidentiary hearing. And I think it is important in the context of everything I have submitted, and this additional evidence, I would like to ask Mr. Moore be permitted to testify.

THE COURT: What did you intend to put in by way of an evidentiary hearing other than Mr. Moore's testimony?

MR. HUNDLEY: Quite frankly, unless I hear an awful lot of contradictions from the Government about my – this last affidavit, I don't think I am. He would be the only witness that I would put on.

THE COURT: All right.

MR. HUNDLEY: Thank you, your Honor.

THE COURT: You may present your argument for the Government. And now before you commence, please remember that the issue, if I should decline to grant an evidentiary hearing, would go up on the single point as to whether or not I should have granted that evidentiary hearing. Evidentiary hearings don't bother me any as far as I am concerned. If you want an evidentiary hearing and the Government is willing to go on with it, fine. Otherwise, don't. If you want an evidentiary hearing, let's argue it after the evidentiary hearing. Now, if you don't want an evidentiary hearing, it's your responsibility if I should rule with the Government on this point as to whether or not I would have given – should have given an evidentiary hearing, namely thus far, to permit the testimony of Mr. Moore.

MR. CAMPBELL: I understand that, your Honor. And the Government does not believe that Mr. Hundley has come forward with any reason that would justify – certainly no reason that would justify relief, justify withdrawing his plea, and no reason that would justify your Honor having to take evidence in this case. Mr. Hundley has gone to the trouble of submitting an affidavit in support of his motion. He

has gone to the trouble of preparing a second affidavit, which he would like to submit to the Court and which although the Government doesn't —

THE COURT: I granted him that permission.

MR. CAMPBELL: I was going to say the Government does not oppose the submission of the affidavit, even though we don't concede every fact or every conclusion that Mr. Hundley asserts in that affidavit.

THE COURT: Are there any important items mentioned in Mr. Hundley's two affidavits that should be resolved?

MR. CAMPBELL: Not — none that require an evidentiary hearing, your Honor, nothing that goes to the voluntariness of the plea.

THE COURT: All right.

MR. CAMPBELL: And that is all this is concerned about here today, as you know.

In order to get an evidentiary hearing as you, yourself, said in the *Thompson* case in writing for the Seventh Circuit, you have got to present to the judge, the trial judge, some kind of fair and just reason, some kind of recognized reason that should — that would permit you to have your plea withdrawn if you proved it through the evidentiary hearing. You have to assert facts which —which are credible in themselves, which are not just conclusions that would justify your getting the hearing.

The defendant through his counsel has not asserted any such facts here. There are no cases supporting Mr. Hundley's position. The case that they cite, the *Blackner* case that you read, your Honor, or the *Daniels* case, your Honor, which you also read, it's ingenious lawyering. It is creative lawyering, but it is still a red herring. It has nothing to do with this. Those circumstances had to do with material terms of the Plea agreement that the judge never found out about and as a result didn't have a chance to ask the defendant about. They have nothing to do with whether the Government submitted one version of the facts or another version of the facts at the plea allocution.

The fundamental fact when you strip away all this, all this stuff about what happened the night before May 8th, is that on May 8th Mr.

Moore stood here. The Government stood over here, gave its factual recitation. You asked him if it was substantially – if it was correct. He said that it was substantially correct. You inquired further. As you noted, you pressed the point. "Well, what is it? Is there anything crucial that you don't agree to," and they both said no. Any flurries that happened before that over what level of detail the factual proffer will go into have got nothing to do with what happened the next day. They are not part of any plea agreement any more than if the Government said, "We would like to put an agent on the stand to testify to the factual basis," and the defense said, "No way. You do it yourself from the podium." And we said, "Okay, fine." That's not – that's not part of the plea agreement. That is just one of the little discussions that you have between counsel. This was not part of the plea agreement. This is not within the *Blackner* case. This is not within the *Daniels* case. Those have to do with terms of the plea agreement.

Mr. Hundley has had the opportunity and has submitted two affidavits. Neither of those affidavits provide a basis even for an evidentiary hearing, your Honor. His contention that he was ambushed by us on April 9th because we hadn't told him about these tapes, we were in the midst of an ongoing crime by the defendant, an ongoing obstruction of justice. He came in here on April 9th and obstructed justice again in an interview with us. Of course we didn't tell him about that, that we had tapes of him obstructing justice. We weren't ambushing Mr. Hundley.

And as you point out and as they point out, we had no obligation to reveal that information in any event. We did because we thought it was fair to tell them what we had so they could plead guilty before getting indicted on all this other stuff if they wanted to. They decided that they did want to.

Again, back to this – these events of May 7th, the night before the plea. Mr. Hundley has told you that the plea – that the plea statements – I'm sorry, the factual statement we were going to submit, but didn't submit, was chock full of critical facts, facts that the defendant wasn't going to admit to. Well, the fact is that we didn't submit all those extraneous facts that the defendant evidently had problems with. And the test of whether they were critical or not was that he stood up the next day and did admit he was guilty. He didn't

have a problem with the factual proffer we did provide to the Court the next day, which covered all of the elements of the offense and which he did admit to.

He has had plenty of time to raise this before, before June 19th or whatever date he filed it.

Over and over again in case after case, your Honor, the courts focus in on, as you know, two key factors in judging these kinds of motions. First of all, was the Rule 11 colloquy complete? This colloquy was complete. And, second, was there any kind of substantial delay in raising the motion? Was it something he could have raised at the time but didn't? This is something he could have raised at the time but didn't.

Mr. Hundley wants to put Mr. Moore on the stand. Mr. Moore could have submitted an affidavit. If Mr. Moore's testimony is going to be substantially the same as what Mr. Hundley has proffered to the Court, you don't have to take evidence because there is no reason to take evidence. You have got those affidavits that Mr. Hundley has proffered to you.

The fundamental point, I think, as far as the evidentiary hearing goes, your Honor, is that you cannot simply come into District Court and waste everybody's time demanding an evidentiary hearing just because you want to get up on the stand and make a speech. He could have proffered his reasons in an affidavit. Mr. Hundley proffered the reasons for him in an affidavit. Mr. Hundley's affidavit —

THE COURT: Mr. Hundley contends that about eight days after he entered the plea before me, the pleas, at least Mr. Savage and, perhaps, others went out to interview him about some case, and at that time Mr. Moore retracted, in effect, that he was guilty of Counts 1, 2, 3 and 4. He never has retracted to this day, I don't believe, on Count 5, which is the obstruction of justice count.

MR. CAMPBELL: I don't want to make Mr. Hundley's arguments for him, but I believe their contention is that that occurred eight or nine days after the plea agreement was signed, not after the plea was entered.

THE COURT: Is that right? I beg your pardon.

MR. HUNDLEY: Yes, sir.

THE COURT: That was after the plea agreement was signed, which would be about the 21st or 22nd of April, and I didn't come over until May the 8th.

MR. CAMPBELL: That is correct, your Honor.

THE COURT: All right.

MR. CAMPBELL: So they are saying at some point in the month between signing the agreement and entering the plea, in a debriefing session about another case, the defendant was being recalcitrant about confessing his full guilt to these things. That may be true. You know, the Government has a lot of experience with people who are recalcitrant about admitting things.

THE COURT: Oh.

MR. CAMPBELL: But the key fact, of course, is there, two weeks or whatever after the supposed recalcitrance, the supposed reluctance to admit his guilt, he came in here and did admit his guilt. That was before the plea.

THE COURT: I thought it was after he came before me. I agree it was after.

MR. CAMPBELL: By May 8th he was admitting that he was guilty. Since then, to all appearances from the record, your Honor, up to the point where the Government said, "We don't think you're being cooperative, Mr. Moore. We don't think you are telling us everything you know," Mr. Moore had never told anyone, either me or Mr. Savage — we submitted affidavits to the Court — had not said, "I'm innocent." He had presented this argument about whether it's extortion or bribery in Count 2. He had said, "I didn't extort him." And Mr. Hundley explained to me —

THE COURT: That is a matter of whether he cooperated or not might come up on a sentencing hearing.

MR. CAMPBELL: True.

THE COURT: Under Rule 32.

MR. CAMPBELL: That's certainly something for the Court to consider if the Court — if we get past this motion and the Court imposes sentence. It is certainly something for you to consider whether he did, in fact, cooperate. We told him we intended to represent to you

that we did not believe his cooperation was substantial; and it was right after that that suddenly Mr. Moore realized that what he had done back in April in signing the plea agreement and back in May in testifying under oath that he was guilty, actually, none of that was true. Actually, it wasn't voluntary. Actually, the Government made him do it or his lawyer made him do it or somebody else made him do it.

Now, part of my — our presentation to the Court is that Mr. Hundley is a very good lawyer. He's a very experienced lawyer and he has a vast experience in these things, but I don't think he is that good. I don't think he is so good that his persuasive powers are such that they overrode the will of Mr. Moore, who is himself a lawyer, and made him get up here and plead guilty before your Honor.

Mr. Hundley still says his advice was good. He would give the same advice today. It was good advice. And Mr. Moore took it.

In any event, your Honor, there has to be some kind of showing, some kind of showing that there is a reason to hear testimony, that there is a reason to take evidence, that there is a fact that could be proved that would justify relief. Nothing has been told to you, nothing has been presented to you, offered to you, about any such fact that would justify the relief that the defendant asks. And that's the Government's position and we are prepared — I understand we are prepared to defend that on appeal. We think that's the right ruling. There is no right to an evidentiary hearing in this case, no absolute right, and they presented no reason for it. I don't know if the Court has any questions.

THE COURT: All right. Mr. Hundley?

MR. HUNDLEY: May I have just a few minutes, your Honor —

THE COURT: If you wish to respond.

MR. HUNDLEY: — Just to answer some of the things that Mr. Campbell said.

It is true that the first disavowal by Mr. Moore of Counts 1, 2, 3 and 4 was immediately after the plea agreement. It's part of my argument that there was a disavowal, not personally because I was the one on the purported facts in the plea agreement and I was on the phone with Mr. Moore, but, you know, the same kind of denial, again, true enough. He came in the next day and we did enter the plea.

THE COURT: The mere fact you are from Washington and Mr. Moore is from West Virginia, of course, he's at liberty to go out there and get – what's his name? Belli, from San Francisco or Los Angeles, Melvin Belli, if he wants to as far as I am concerned, but that is no –

MR. HUNDLEY: Yes.

THE COURT: We can't worry about that. In other words, you have come to Charleston. It's just like you are living with Mr. Moore and you know all about everything, what he does and so on. We can't hang our hats on worrying about that.

MR. HUNDLEY: But, again, and this is in my affidavit which I didn't allude to in my prior argument because it didn't come up, but Mr. Campbell brought it up, but it was again this time, I believe it was in late May. It was after the plea of guilty had been entered before your Honor. And, again, you know, pursuant to the plea agreement where he had to cooperate with the Government, he was being interviewed by several FBI agents, some IRS agents, and I believe Mr. Ellis – the Assistant United States Attorney Ellis was there, and I was at that interview. And they were asking him about a variety of things and whatnot, and then during the course of that interview – and I don't know exactly how it came up – but one of the agents asked a question in connection with the Marrowbone money and, again, Mr. Moore said that, "You know, I never – I never really received that Marrowbone money."

THE COURT: Do we have this in evidence now?

MR. HUNDLEY: Well, I have got it in my affidavit.

THE COURT: All right, that is all right. You were there.

MR. HUNDLEY: I don't think anybody disputes that that happened and I called – I stopped any further interrogation on the point because the Marrowbone money, you know, contrary to what the Government says, that goes right to the heart of one of the counts. And I stepped outside with Mr. Ellis and I told, you know, Mr. Ellis that, you know, I mean, this is going on and on and on. And, you know, I am really concerned about this plea and whatnot. And it was from that – that was the first time that I think Mr. Moore then drove me to the airport and, you know, I said, you know, again, we have this problem with the Marrowbone money and, you know –

THE COURT: Well, the Marrowbone $50,000 —

MR. HUNDLEY: $50,000.

THE COURT: — Is in one of the income tax charges.

MR. HUNDLEY: That is right.

THE COURT: Well, certainly in your investigation with Mr. Moore and in talking to him about it, you would have asked him whether or not he — what they had on the income tax charges, wouldn't you? I mean, I know you're a capable lawyer and you can't —

MR. HUNDLEY: I went to great pains — as a matter of fact, one of the things that I personally went over to tell Mr. Campbell that I didn't want him to take umbrage of something I had said in my affidavit, because during all of this hectic negotiation on the 11th, I am trying to find out what the evidence — what evidence the Government has, not on the obstruction. I had heard the tapes. I'm trying to find out the evidence they have on the different counts. And I — I did kind of mislead Mr. Campbell. I think I told him I was making some progress with Mr. Moore on the Kizer count, the extortion count, because I wanted Mr. Campbell to tell me what the evidence was they had in that count and he did.

THE COURT: Then there comes a day when the indictment has to be returned and you know what evidence is available to you then.

MR. HUNDLEY: I know, I know.

THE COURT: Under Rule 16 and other rules of the Federal Rules of Criminal Procedure, you know what you can get and what you can't get. All you had to do was tell Mr. Moore to plead not guilty and put the show on the road.

MR. HUNDLEY: The point is — the point is, your Honor, that I was satisfied with the Government's evidence on those points, right? And I had listened to the tapes, which I am frank to admit made quite an impact on me, and I think the Government knew that and whatnot. And I went over, and I can be quite forceful on occasions when I have to. And, you know, I couldn't get any wood to lay —because they wouldn't bring the jury back on Good Friday, and about as forcefully as I can told Mr. Moore what, you know, the Government's theories

and the evidence, what I thought about those tapes, and advised him. I thought I did it in his best interest.

THE COURT: What did you tell him about the Marrowbone $50,000.

MR. HUNDLEY: That was not even discussed at that time.

THE COURT: But prosecution – wait a minute. Prosecution and defense don't have to talk about it when it's named in the indictment. It was finally named in the indictment. Didn't you ever talk to Mr. – your client about this?

MR. HUNDLEY: Ultimately. And at one time I thought I had it straightened out, and I never really had it straightened out, is what I am telling this Court. That is why I think it is important for the Court to hear Mr. Moore. I have told you why I did what I did. I think it's important for the Court to hear Mr. Moore.

THE COURT: I'm trying to get – I am trying to get what your advice had been if you had known anything. You apparently – I thought you had gone through it. I asked you whether you had asked him whether there was any possible defenses on May the 8th. I said, "Were there any possible defenses," and you said, "No."

MR. HUNDLEY: I didn't think there were any defenses. The question is, what does my client really think? Why did he say what he did, you know?

THE COURT: I can't answer for your client because I don't represent him.

MR. HUNDLEY: Well, that's why I'm asking the Court to hear my client. I think I have made – I don't know why the Government should object to it.

THE COURT: He is asking for a whole lot, Mr. Hundley, when he comes in here and when he was under oath before me, to now try to say, "Well, I didn't mean that and I didn't mean that." Is there anything wrong with my questions? He said he understood every one of them.

MR. HUNDLEY: I think your questions would have been different had I come in that morning, as I think I should have, with the

Government, and outlined these disavowals that we were having right from the start. I should have done that.

THE COURT: Certainly the only thing you had to do was tell him to plead not guilty. That is all that is necessary in any case.

MR. HUNDLEY: I didn't. That is what I am saying. I told him to plead guilty. I think he was influenced by the fact that I gave him this very, very strong advice and that I stood by his side when he was doing it. And people who were observing, I'm sure, saw me whispering in his ear and tugging on his coat occasionally. I'm sure your Honor did.

Again, I make that request for a limited evidentiary hearing, your Honor. I think I — and I really think it would be in the interests of fairness and justice to let him be heard on this. I am not going to interrogate him. Mr. Gondelman is. Anybody from the Government can cross-examine him, whether they submitted an affidavit or not.

THE COURT: All right. Well —

MR. HUNDLEY: Unless your Honor has anything.

THE COURT: Gentlemen, if the Court of Appeals insists upon evidentiary hearings in all of these cases, then they will have to do it in this one.

There is no fair and just reason why I should permit now the withdrawal of the pleas of guilty which were made voluntarily under oath by Mr. Moore, answering every question specifically that he thoroughly understood them, and that's his position. Now he wishes to change his plea. I think that he's too late. At least he will be in a position of saying to his friends some day, "Well, I tried to get the plea changed," and if that will help him any, why, that is all right with me. But, the sentencing will go on tomorrow morning.

MR. HUNDLEY: Your Honor, can I make my second affidavit a part of the record?

THE COURT: Beg your pardon?

MR. HUNDLEY: Can I make my second affidavit a part of the record?

THE COURT: Yes, I said that I would permit it to be filed.

MR. HUNDLEY: Yes, I thought.

MR. CAMPBELL: No objection, your Honor.

THE COURT: I said I would permit it to be filed, if you will just leave it with the clerk.

MR. ELLIS: Your Honor, I have a further matter. For this motion to withdraw, I would like to present the Court with the motion. An order has been signed by both parties.

THE COURT: Is that an endorsed order?

MR. ELLIS: Yes, it is.

THE COURT: Is that satisfactory, Mr. Hundley, for me to enter an order withdrawing that from the record?

MR. HUNDLEY: Yes. And I just would want to add this. Mr. Ellis made the representation to me on the phone that it was, you know, withdrawn for good, that it will not be resubmitted tomorrow or et cetera. So that is perfectly satisfactory.

THE COURT: It will be withdrawn for good as far as I am concerned. If some appellate court should call it to my attention, I have a copy and I would answer truthfully under oath or otherwise and produce what was submitted to me and which you gentleman have now agreed was inadvertently filed.

MR. ELLIS: Thank you, your Honor.

(Handing to the Court.)

THE COURT: Anything else, then, gentlemen?

MR. CAMPBELL: Nothing, your Honor.

MR. HUNDLEY: Your Honor, just as a matter of procedure, what — and I am not asking for any continuance or anything like that. I had not submitted to the presentence officer any version of our events, you know, in light of the motion I had filed. I'm going to get together with him and I'm sure I can get it to him early this afternoon — well, I'll get it to him this afternoon.

THE COURT: Well, I would be glad to have anything that you wish to present, Mr. Hundley.

MR. HUNDLEY: Or if you want, I could do it orally. The reasons why I didn't submit it were for obvious reasons, you know, if your Honor granted the motion.

THE COURT: All right, could you get it to me by 9:00 o'clock tomorrow morning?

MR. HUNDLEY: Yes, sir; yes, sir. I'll get it directly to you, sir.

THE COURT: I will be here at Judge Knapp's, and get them a copy.

MR. SAVAGE: If there is any chance it is done earlier, the Government would like to get it to prepare any response to the document, assuming it requires a response.

THE COURT: If you file a response and Mr. Hundley wants to file a response to you, and here we go on the old merry-go-round.

MR. HUNDLEY: I will get it to him at 10:00 p.m. tonight.

MR. CAMPBELL: I will get it the same place you got yours.

THE COURT: Mr. Moore continues on his bond for his appearance here tomorrow morning at 9:30.

(Adjourn court at 3:15 p.m, July 9, 1990.)

CERTIFICATE

I, Jennifer Vail-Kirkbride, Registered Professional Reporter and Official Reporter of the United States District Court, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-styled action on the 9th day of July, 1990, as reported by me in stenotypy.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Given under my hand this 25th day of July, 1990.

/s/

Official Court Reporter
United States District Court

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

v.

ARCH A. MOORE, JR.

Defendant.

Criminal No. 2: 90-00078

AFFIDAVIT OF WILLIAM G. HUNDLEY

I, William G. Hundley, being duly sworn, hereby state the following to be true and correct:

1. I am counsel for the defendant, Arch A. Moore. I have represented him in connection with the matters currently before the Court.

2. In the course of this representation, I learned that on January 8, 1990, the government tape-recorded and video-taped a meeting between Mr. Moore and John Leabury, his 1988 campaign manager. On January 9, 1990, they recorded a telephone conversation between Mr. Moore and Mr. Leabury.

3. On January 10, 1990, pursuant to a prearranged agreement between me and the prosecutors, the government conducted an all day interview of Mr. Moore with counsel in the United States Attorney's office in Charleston, West Virginia.

4. After the interview was concluded the government recorded another telephone conversation between Mr. Moore and Mr. Leabury on January 11, 1990.

5. I had no knowledge of the meeting on January 8 or the telephone calls on January 9 and 11, or of the fact that they were recorded.

6. After the January 10 interview, Mr. Moore received a target letter offering him an opportunity to appear before the Grand Jury. Upon my advice, Mr. Moore declined to appear before the Grand Jury.

7. My client and I did agree to a further interview by the government on "new matters" uncovered by the government since the January 10 interview. This interview was conducted on April 9, 1990, in the United States Attorney's office in Charleston, West Virginia.

8. At the conclusion of the April 9 interview, Mr. Moore was excused and I was advised by the government for the first time of the Moore/Leabury recordings of January 8, 10, and 11. I requested an opportunity to listen to these tapes. The government agreed to play the tapes for me, but not for Mr. Moore. This was done April 11, 1990, in Charleston. According to the government, as I was listening to the tapes, the Grand Jury was sitting in Charleston ready to return its indictment against Mr. Moore. After listening to the tapes and talking to my client, I began plea bargaining negotiations with the government. The government took the very strong position that, in addition to obstruction of justice as evidenced by the tapes, Mr. Moore would have to plead to extortion, mail fraud and two (2) tax counts; otherwise, that same day the Grand Jury was going to return, to my recollection, a 28 count indictment including RICO and other unspecified charges. Mr. Moore expressed strong reservations to me about Counts 1, 2, 3, and 4. I conveyed these concerns to the government. However, when the government agreed to structure the indictment so that the obstruction of justice Count was the only Count within the Sentencing Guidelines, I strongly advised Mr. Moore to agree to the terms of the plea agreement.

9. I then requested the government to delay the Grand Jury's action until at least Friday, April 13 so that my client and I could have time to discuss this important decision in detail and without undue pressure. When the government refused and said that the morning of April 12 was our deadline, I signed the plea agreement and strongly advised Mr. Moore to do so. The next morning he advised me that he would follow my advice and sign the agreement. This is why the dates of my signature and Mr. Moore's signature are different, as the Court noted at the time of plea.

10. Prior to entry of the plea, I agreed that the government could submit to the Court a written statement of the evidence the government would prevent to prove the charges in the indictment in lieu of oral allocation at the plea. It was not until 10:00 p.m. the night of May 7,

the night before the plea, that the government presented me with a 26 page statement of purported facts plus exhibits and transcripts of the recorded Moore-Leabury January 8 meeting which it intended to submit to the Court. I advised the government that the statement was full of purported facts to which Mr. Moore would never agree and, unless the government withdrew the statement and made a simple, short oral allocation at the plea, I was going to request a meeting with the Court the next morning to inform the Court that there would be no plea. The government agreed not to submit the statement and, again, upon my advice Mr. Moore went ahead and entered the plea on May 8, 1990.

11. Because of the lateness of the hour on May 7 that the government's statement of evidence was submitted to me and the anxiety and pressure he was undergoing because of the impending plea the next morning, Mr. Moore really did not have an opportunity to absorb the contents of that statement before, on my advice, he entered the plea the following day. If he had, in my opinion, he would not have pleaded guilty.

12. Since that time, Mr. Moore has repeatedly pointed to the statements of government witnesses in the government's statement of fact which pertain to Counts 1 through 4 and which he vehemently states are not true, i.e. he denies that he ever extorted under color of right, or in any other manner, anything from Paul Kizer, an immunized government witness. He vehemently denies Kizer's version of the extortion Count. Tending to corroborate his view of Mr. Kizer is a recently reported press interview of Mr. Kizer where Mr. Kizer says Arch Moore promised him a pardon for a $50,000 political contribution on October 20, 1988, the very date Kizer had two $50,000 checks sent to the National Republican Committee. On October 19, 20, and 21, 1988, Mr. Moore was campaigning throughout West Virginia and, by all accounts, was never in his office where Mr. Kizer says the pardon was promised in return for the $50,000 contribution.

13. During a recent interview with numerous federal agents in line with our plea agreement to cooperate with the government, Mr. Moore told the agents he never really received the $50,000 campaign contribution from Mr. Smith as alleged in the indictment.

14. All of this had led me to the inescapable conclusion that Mr. Moore only pleaded guilty to Counts 1 through 4 because of the threat of a much broader indictment, the impact which the Leabury tape had on me, and the strong advice I gave him to enter the plea.

15. Justice and fairness will best be served by giving Mr. Moore his day in court. There is no prejudice to the government because, according to the prosecutors, they had the 28 Count indictment ready to be voted on and handed up on April 11. We have signed every waiver of the statute of limitations the government has requested and will sign any others requested if necessary.

_____
WILLIAM G. HUNDLEY

Sworn to and subscribed before me
this _____ day of June, 1990

_____
Notary Public

My Commission expires _____.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

v.

ARCH A. MOORE, JR.,

Defendant.

Criminal No. 2: 90-00078

SECOND AFFIDAVIT OF WILLIAM G. HUNDLEY

1. It is true, as the government claims in its affidavits, that I knew in at least March, 1990 that the government was going to seek an indictment of Mr. Moore and, in a general way, the charges that were being considered. What I did not know, and what was consciously being concealed from me until the appropriate time, was that obstruction of justice was involved and that the government had two witnesses who had recorded my client. In fact at one of the Justice Department conferences in March, 1990, in Washington, D.C. at which all of the prosecutors were present, the Deputy Chief of the Public Integrity Section, Lee Radik, asked me if I had given any thought to plea bargaining. When I responded that, in all my conversations with the prosecutors, I had not yet heard anything that would cause me to consider a plea, nobody from the government's side responded.

2. At the time of the April interview, I did not know that an indictment had been authorized. The interview of Mr. Moore on April 9 lasted from approximately 1:30 p.m. to 3:30 p.m. At the conclusion of the interview the prosecutors asked if they could speak with me alone. They then told me that they had tapes of Mr. Moore obstructing justice with Mr. Leabury on January 8, 9 and 11 and that they also had recordings of Kizer conversations with my client. They told me what was on the Leabury tapes, but were vague about the contents of the Kizer recordings except that they incriminated my client. They invited me to plea bargain, but I told them I wanted to listen to the tapes first. They would not agree to that. Contrary to the government's assertions, there was no plea bargaining on April 9. When they would not agree

to let me hear the tapes, I left the U.S. Attorney's Office with Mr. Moore and conveyed to him what the prosecution told me. I told Mr. Moore I was going back to Washington to request that I be permitted to listen to the tapes. I left Charleston for Washington, D.C. on an evening flight on April 9.

3. The next day, April 10, I contacted the Deputy Chief of the Public Integrity Section, Mr. Lee Radik, in Washington, D.C. and he agreed to make arrangements in Charleston for me to listen to the tapes. That same day, Mr. Savage called me from Charleston and I asked him what Mr. Moore would have to plead in addition to obstruction of justice. When he said RICO, I categorically rejected the offer. Later in the day, Mr. Campbell called from Charleston and said Mr. Moore would not have to plead to RICO, but the government would want extortion, mail fraud, and tax counts in addition to the obstruction count. I agreed to discuss that after I listened to the tapes. Contrary to the government's assertion, there was no plea bargaining on April 10 because I was in Washington, D.C. seeking permission to listen to the tapes.

4. I flew back to Charleston the morning of April 11. When I arrived at the U.S. Attorney's Office, the news media was there in force. Mr. Carey informed me that the Justice Department's Public Information Office had issued a statement that something very newsworthy was going to happen that day in Charleston. That was the first I knew that the government planned to return its indictment that day, April 11. As per Mr. Radik's word, they did let me listen to the Leabury tapes of January 8, 9, and 11. They gave me some reason why they did not have the Kizer tapes there which I honestly do not recall. After listening to the Leabury tapes I did begin, for the first time, to plea bargain. I was told it would have to be an indictment rather than information and would have to include five counts. They did agree to make Count 5 the only guideline offense and to put certain things in the plea agreement that I had requested, i.e., that they would make no specific recommendation to sentence. I did not get any paper over to my client until late that afternoon. Because of the lateness of the hour, the government advised me that they had sent the grand jury home and were bringing them back at noon the following day. It was at that time that I asked the government to delay the indictment until April 13, one day, to give me and my client a little more time to reach a decision. I

was told they did not want to bring the grand jury back on Good Friday and that my deadline was noon on April 12. The Statute of Limitations was never mentioned and was never a factor. I would have given them any waiver they wanted.

I did convey to the prosecution at that time my client's reservations about Counts 1 through 4, particularly the mail fraud and extortion counts. I do remember Mr. Campbell, at my request, outlining the government's evidence on the extortion count and the discussions that, even if it was bribery by Kizer, it was covered under the Color of Right extortion theory. While I am not denying that I was impressed with the evidence, I never told Mr. Campbell or any of the other prosecutor that Mr. Moore was admitting all this to me because he was not. I also understood the government's theory on Count 1, that since the underground campaign funds were cash and unreported and illegal under West Virginia law, this could be strained and stretched to constitute a mail fraud. While I was not overwhelmed with this theory, I accepted it.

By late evening April 11, I was satisfied with the government's theories and evidence on Counts 1 through 4 and strongly advised Mr. Moore to sign the plea agreement. I told him I was not happy with the plea agreement, but it was clearly the lesser of the two evils from which we had to choose. He signed it late the next morning.

5. The cracks in the plea agreement began to surface shortly thereafter. As Mr. Savage states in his affidavit (p. 4 ¶9), shortly after the plea agreement was executed, the government interviewed Mr. Moore in line with the Cooperation Agreement preparatory to his testifying as a government witness in the *Ellis* case. Mr. Savage treats Mr. Moore's "problems" with Counts 1 through 4 rather lightly in his affidavit, but following this meeting, Mr. Savage called me in Washington, D.C. to tell me that my client was not admitting anything except the obstruction of justice. I went to Charleston, as he suggested, and asked him to outline in detail the evidence the government had on the $50,000 cash Marrowbone contribution, which he did (p. 4 ¶8 Savage affidavit) and which I found convincing. I conveyed this to Mr. Moore with my observation that the government had convincing corroborated evidence of the transaction. I did then tell Mr. Savage that I thought the problem was resolved. Moore did then testify in the

Ellis case and Mr. Savage told me he was a truthful witness and that he would so advise the Court at sentencing.

6. As to the events of the night of May 7, Mr. Savage's affidavit omits the fact that I told him most vehemently that there were a lot of purported facts in that statement of evidence that my client would never admit and that, unless it was withdrawn, there was not going to be any plea. I was very upset and very serious. Mr. Savage said he would convey my objections to his supervisors, but he could not make any commitment that at this late date it could be withdrawn. At 8:30 a.m. on May 8, I spoke to Mr. Campbell who said that, in view of my strong objections to the statement, they would not submit it to the Court, but would make a brief oral allocation as I had suggested. With that I advised Mr. Moore to go ahead with the plea. At the plea itself there was, in my opinion, a long pause by Mr. Moore before he answered your Honor's question about whether his plea was the result of duress or coercion.

Rightly or wrongly, I reacted to the government's statement of evidence the way I did on the night of May 7 because I was trying to save the plea which I had strongly recommended and which I felt was in my client's best interest. What I should have done is gone to your Honor the morning of May 8 with the government and, just as I have in this affidavit, laid out these problems. I regret that I did not.

7. The whole matter came to a head again when Mr. Moore was interviewed in my presence by the federal agents and Assistant U.S. Attorney Larry Ellis at the end of May, but not for the reasons stated in the government's papers. During the course of this interview, Mr. Moore again stated that he never received the $50,000 Marrowbone money which is really at the heart of one of the tax counts. I stopped further questioning on the indictment and told Mr. Ellis of my concern with the plea.

There followed a series of meetings with Mr. Moore trying to put together the defendant's version of the offense for the presentence report. Mr. Moore would not accept responsibility for Counts 1 through 4 because he said he was not guilty of these offenses.

Mr. Savage did call me in early June as he states (p. 5 ¶12 Savage Affidavit) and told me that he was going to advise the Court at sentencing that my client was not cooperating with the government

and interestingly "had not accepted responsibility." (p. 6 ¶12). I asked Mr. Savage what he would say about Mr. Moore's testimony in the *Ellis* case. He said he would tell the Court he gave truthful testimony in that case.

The fact that Mr. Savage told me he was going to advise the Court that, in his opinion, Mr. Moore was not cooperating with the government played no part in the decision to file this motion to withdraw the plea.

8. In view of Mr. Moore's adamant position on Counts 1 through 4 (I had promised Mr. Kuklar our version of the offense the second week in June) I told Mr. Moore in mid-June to give serious thought to whether he wanted to file a motion to withdraw the plea. I told him I would file the motion if he so desired. We agreed to meet June 19 to make a final decision. I called Mr. Campbell to alert him that a motion to withdraw was being contemplated. The decision to file was reached June 19.

9. I have set out these facts in such detail under oath because I believe that, in toto, they provide fair and just reasons to withdraw these guilty pleas. There are, as I have stated, some things that I wish I had done differently. I believe my client was always troubled and uncertain about the guilty plea to Counts 1, 2, 3, and 4. I have been a criminal defense attorney since I left the Justice Department in 1966. This is the first time I have ever filed a motion to withdraw a guilty plea.

/s/
William G. Hundley

Sworn to and subscribed before me
this 9th day of July, 1990.

/s/
Notary Public
My Commission expires _____.

U.S. Department of Justice

United States Attorney
Southern District of West Virginia

April 11, 1990

William G. Hundley, Esquire
Akin, Gump, Strauss, Hauer and Feld
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036

Re: *Arch A. Moore, Jr.*

Dear Mr. Hundley:

This will confirm our conversations with regard to your client, Arch A. Moore, Jr. (hereinafter "Mr. Moore"). As a result of these conversations, it is agreed by and between the United States and Mr. Moore as follows:

1. Mr. Moore expressly waives the statute of limitations and any rights provided by Title 18, United States Code, Section 3282 until final disposition of this matter. Mr. Moore expressly acknowledges by this waiver that he will not assert statute of limitations or Title 18, United States Code, Section 3282 as a defendant to any charge ultimately prosecuted concerning offenses committed during the time period from December 1, 1984, to the date of final disposition in this matter, inclusive.

2. It is anticipated that one or more indictments will be presented to a federal grand jury in this district charging Mr. Moore, and perhaps others, with violations of certain federal laws. The Office of the United States Attorney for this district will present such indictment or indictments to that grand jury, which will name Mr. Moore as a defendant in five counts charging Mr. Moore as follows:

A. One count of violation of Title 18, United States Code, Section 1341 (mail fraud);

B. One count of violation of Title 18, United States Code, Secton 1951 (extortion);

C. Two counts of violation of Title 26, United States Code, Section 7206 (1) (filing a false tax return);

D. One count of violation of Title 18, United States Code, Section 1503 (obstruction of justice)

and as an unindicted co-conspirator and unindicted aider and abettor in appropriate subsequent additional counts and additional indictments.

3. In the event that the grand jury returns a true bill of indictment, Mr. Moore will plead guilty to those counts which will charge him, and perhaps others, with violations of the federal criminal statutes referred to in paragraph 2 above.

4. The statutory maximum penalty to which Mr. Moore will be exposed per violation in the Southern District of West Virginia by virtue of his pleas of guilty as stated in paragraph 2 are:

A. Title 18, United States Code, Section 1341 (mail fraud): imprisonment for a period of five (5) years and a fine of $250,000, or not more than twice the gross pecuniary gain realized by Mr. Moore or not more than twice the gross pecuniary loss to another as a result of the offense, or both such fine and imprisonment;

B. Title 18, United States Code, Secton 1951 (extortion): imprisonment for a period of twenty (20) years and a fine of $250,000, or not more than twice the gross pecuniary gain realized by Mr. Moore or not more than twice the gross pecuniary loss to another as a result of the offense, or both such fine and imprisonment;

C. Title 26, United States Code, Section 7206(1) (filing a false tax return): imprisonment for a period of three (3) years for each of the two counts and a fine of $250,000 or not more than twice the gross pecuniary gain realized by Mr. Moore or not more than twice the gross pecuniary loss to another as a result of the offense, or both such fine and imprisonment;

D. Title 18, United States Code, Section 1503 (obstruction of justice): imprisonment for a period of five (5) years and a fine of $250,000 or not more than twice the gross pecuniary gain realized by Mr. Moore or not more than twice the gross

pecuniary loss to another as a result of the offense, or both such fine and imprisonment;

for a total exposure of thirty-six (36) years and a total maximum fine of the combined maximum for each of the five counts, plus costs of prosecution as to the tax offenses. Mr. Moore is subject to a maximum term of supervised release of three (3) years. In addition, Mr. Moore will be subject to the provisions of the Victim and Witness Protection Act of 1982, and criminal assessment pursuant to Title 18, United States Code, Section 3013. The $250 criminal assessment will be paid in full to the Clerk at the time Mr. Moore is sentenced.

5. Mr. Moore will be completely forthright and truthful with this office and federal, state and local law enforcement agents with regard to any inquiries made of him. In addition, Mr. Moore will give signed, sworn statements, grand jury testimony and trial testimony relative thereto, if same are deemed necessary. During any interviews conducted pursuant to this agreement, except appearances before the grand jury, Mr. Moore may have counsel present if he desires.

6. Mr. Moore will work with representatives of the Internal Revenue Service for the purpose of: (a) determining (by taxable period) the total net income and taxable income derived by him as a result of his activity which resulted in this plea agreement for the calendar years 1984 through the present; (b) filing correct federal income tax returns for the calendar years 1984 through the present, if due; (c) amending existing returns on file for the calendar years 1984 through the present, if due; (d) amending existing returns on file for the calendar years 1984 through the present to include the net income and taxable income determined in item (a); and (e) paying all taxes determined to be due and owing to the fullest extent possible. Mr. Moore agrees that he will file correct federal income tax returns, if due or amend existing returns on file within a reasonable period of time from the Court's acceptance of this agreement. Mr. Moore will agree to the release of all tax-related information obtained by the United States Attorney's Office during the course of this investigation to civil representatives of the Internal Revenue Service.

7. Mr. Moore hereby agrees to make restitution as ordered by the Court in accordance with the provisions of the Victim and Witness Protection Act of 1982, Title 18, United States Code, Sections 3579-

3580, and any other applicable federal law, relating to restitution rights of victims of crimes.

8. Nothing contained in any statement or testimony given by Mr. Moore pursuant to this agreement or any evidence developed therefrom will be used against him in any further criminal prosecutions or in determining the applicable guideline range under the Federal Sentencing Guidelines unless this agreement becomes void due to violation of any of its terms by him. However, nothing contained in this agreement restricts the use of information obtained by the United States from an independent, legitimate source, separate and apart from that information and testimony being provided by the defendant pursuant to this agreement, in determining the applicable guideline range, nor does this agreement prevent Mr. Moore from being prosecuted for any violations of federal and state laws he may have committed should evidence of any such violations be obtained from any such independent, legitimate source. In addition, this agreement does not prevent the United States from prosecuting Mr. Moore for perjury or the giving of a false statement to federal agents, if such a situation should occur by virtue of his failing to be fully forthright and truthful pursuant to paragraph 5 herein.

9. There have been no promises or representations whatsoever made to Mr. Moore by the United States or any of its agents as to what the final disposition in this matter will be. It is understood that the matter of sentencing is within the sole discretion of the Court and the United States will make no recommendation as to a specific sentence. However, the United States retains the right to inform the probation office and the Court of any relevant facts, to address the Court with respect to the nature and seriousness of the offense, to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report and to respond to any statements made to the Court by or on behalf of Mr. Moore.

10. At final disposition, the United States will advise the Court of the nature and extent of Mr. Moore's forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give same such weight as the Court deems appropriate. The United States will also advise the Probation Department and the Court of the nature and extent of Mr. Moore's recognition and affirmative acceptance of

personal responsibility for his criminal conduct, or his failure to do so. The United States and Mr. Moore understand and agree that the Court has the sole discretion to determine whether the defendant has adequately accepted responsibility.

11. The conviction and final disposition of Mr. Moore, pursuant to his plea of guilty to the indictment, and his fulfilling each of his responsibilities as set forth in the above ten (10) paragraphs of this agreement will conclude the prosecution in the Southern District of West Virginia of Mr. Moore by the United States for violations of Title 18 and Title 26 committed prior to the date of the execution of this agreement.

12. If either the United States or Mr. Moore violates any of the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept the terms of this agreement, it shall be void.

13. This written agreement constitutes the entire agreement between the United States and Mr. Moore in this matter. There are no agreements, understandings, or recommendations as to any other pending or future charges against Mr. Moore in any court other than the United States District Court for the Southern District of West Virginia.

Very truly yours,

MICHAEL W. CAREY
United States Attorney

By: _____
LARRY R. ELLIS
Assistant United States Attorney

NANCY C. HILL
Chief, Criminal Division

_____
JOSEPH F. SAVAGE, JR.
Assistant United States Attorney

_____
JOHN M. CAMPBELL
Trial Attorney
U.S. Department of Justice
Public Integrity Section

/ljw

As evidenced by my signature at the bottom of the seven (7) pages of this letter agreement, I have read and understand the provisions of each paragraph herein and, hereby, fully approve of each provision.

/s/	4/12/90
ARCH A. MOORE, JR. Defendant	Date Signed

/s/	4/11/90
WILLIAM G. HUNDLEY Attorney for Defendant	Date Signed

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

VS.

ARCH A. MOORE, JR.,

Defendant.

CRIMINAL ACTION NO.
2:90-00078

Proceedings had in the sentencing hearing of the above-styled action before Honorable Walter E. Hoffman, Judge, on Tuesday, July 10, 1990, commencing at 9:30 a.m. at Charleston, West Virginia.

APPEARANCES:

On Behalf of the United States of America:
JOSEPH F. SAVAGE, JR., ESQUIRE
Assistant United States Attorney

LARRY R. ELLIS, ESQUIRE
Assistant United States Attorney

JOHN M. CAMPBELL, ESQUIRE
Trial Attorney, Public Integrity Section
U.S. Department of Justice

On Behalf of the Defendant, Arch A. Moore, Jr.:
WILLIAM G. HUNDLEY, ESQUIRE
and
LARRY S. GONDELMAN, ESQUIRE
Akin, Gump, Strauss, Hauer & Feld
1333 New Hampshire Avenue, N.W., Suite 400
Washington, DC 20036

The Defendant, ARCH A. MOORE, JR., was present in person.

INDEX

Witness	Direct	Cross	Redirect	Recross
By the Government:				
THOMAS L. KUHN	84	92	96	97

PROCEEDINGS (9:30 a.m.)

THE COURT: Gentlemen, may I inquire, is the State of West Virginia represented by the Attorney General here?

MR. SAVAGE: Your Honor, they are represented by the Attorney General's office. There is a person from that office present here today if the Court has inquiry.

THE COURT: All right.

The probation officer's presentence report, I have examined. I did not see it until after the conclusion of the session on yesterday, as I tried to follow the policy as much as possible of not looking at a presentence report while there are any pending motions. That's not always possible, of course, but I did — was successful in this case and notified Mr. Kuklar that I did not want to see the report until after I disposed of the motion.

May I inquire, Mr. Hundley, have you and Mr. Moore gone over this presentence report carefully?

MR. HUNDLEY: Yes, your Honor.

THE COURT: And may I inquire also whether or not you have any corrections or deletions or additions that you feel should be made to the report?

MR. HUNDLEY: No, your Honor. There were just a few, minor corrections which either myself or Mr. Moore conveyed directly to Mr. Kuklar, which he made.

THE COURT: Well, for example, right at the start it says the grand jury returned an indictment on April 10th. Was that correct?

MR. HUNDLEY: I told Mr. Kuklar that was a typographical error.

THE COURT: It was April the 12th, wasn't it?

MR. HUNDLEY: Yes. That typo withstood. No, we talked about that, yes.

THE COURT: Do you have any other suggestions as to what the minor inaccuracies may be?

MR. HUNDLEY: No, we had corrected them. Mr. Moore had made some suggested corrections on the financials, which have been

incorporated, at least in the report that I saw, indicating that a lot of the holdings were joint holdings, not just being held by Mr. Moore.

THE COURT: I don't know whether they have – I see some real estate jointly held by Mr. Moore and his wife in Alexandria, Virginia. And I – a joint KEOGH account. Were there any other jointly – oh, yes, and checking accounts held jointly by Mr. Moore and his wife are listed here with the Mercantile Banking and Trust Company of Moundsville, Virginia (sic).

MR. HUNDLEY: No, your Honor.

THE COURT: Well, they have been corrected in the report.

MR. HUNDLEY: Yes. I thought the April 10th date had been corrected, but it was a persistent typo, I guess is all it was.

THE COURT: Do you recall any others that you and Mr. Moore may have discovered during the time?

MR. HUNDLEY: No, no, your Honor.

THE COURT: Mr. Moore, you have gone over this report, I take it, with Mr. Hundley; have you not, sir?

THE DEFENDANT: And with the probation officer.

THE COURT: And with the probation officer.

THE DEFENDANT: Yes, I have.

THE COURT: And do you find that it is essentially correct from the standpoint of the actual facts that have been disclosed by the probation officer?

THE DEFENDANT: Your Honor, I do.

THE COURT: All right. Thank you, sir.

Does the Government have any comment with respect to the content or factual content of the presentence report?

MR. SAVAGE: Your Honor, the report is accurate in all respects.

THE COURT: All right. All right, if that be the case, I would be glad to hear from counsel as to their views as to what disposition should be made of the case. This, of course, is without prejudice to Mr. Moore. As to the correctness of my actions on yesterday, will be

reviewed some day, I suppose, and that's of no concern of mine from now on. But, Mr. Hundley, would you like to make any comments as to your feelings with respect to the disposition of these five counts in the indictment?

MR. HUNDLEY: Yes, your Honor.

First, let me point out that my client in my opinion, and I believe that Mr. Kuklar has so informed your Honor, that he cooperated fully and completely in the presentence process.

Apropos, the dispute that has arisen between the Government and myself about Mr. Moore's cooperation with the Government pursuant to, I believe, numbered paragraph 5 of the plea agreement. I would only state, your Honor, that the Government thought back at that time enough of Mr. Moore's cooperation that they called him as a Government witness in the Ellis case. And he told me at that time that they certainly considered Mr. Moore to be a completely truthful witness in that case.

And if you will recall, your Honor, the Government could not wait to talk to Mr. Moore after the plea agreement because they were so vitally interested in having Mr. Moore testify in that case. And I think that that is the proof of the pudding of his cooperation.

As far as to the other sessions that Mr. Moore had with the many investigators who were present, I was present at those. He answered each and every question that the Government answered — that the Government asked. I submit to your Honor that the mere fact that the Government didn't like the answers, perhaps, that they were getting is no indication that he didn't — did not cooperate. The tangible proof of his cooperation was, as I believe they will still admit, is that he was a truthful witness in the one case to which he was called.

Your Honor, I have known and, you know, represented Mr. Moore for over 20 years. And I have, you know, had an opportunity to observe him both as, you know, a friend and a client. I know his family. I know that he is a completely devoted family man, that is, a close model family man in every sense of the word. I know that the family, along with Mr. Moore, although he puts up as brave a front as I have seen a human being put up under the circumstances, has been absolutely devastated by these lengthy proceedings, changes of posi-

tions. And everybody, I assure you, are trying to act in the utmost good faith before this court.

I mean, he's a man who has not only served his country in World War II, as I did; I mean, he almost gave his life for his country. He was an infantry man in the trenches, left for dead, wounded, decorated. I mean, those were the things that, you know, to me — you know, maybe it is my generation, you know, are so very, very important in trying to measure a man in a difficult situation, is his service to his country, his family, the important things.

He was certainly, certainly fine enough for the fine people of the State of West Virginia to be elected three times to the highest office in this state. All during that time, which I guess goes back to the genesis of our friendship and association as lawyer/client, all — you might say almost all through that period he was being chased by the federal government with high profile visibility in the media and whatnot; and notwithstanding all of that, was elected by the people of this fine State of West Virginia three times to serve as the top government official. And I submit, your Honor, that he served well and honorably.

THE COURT: I don't understand that the Government started its investigation —

MR. HUNDLEY: Not in this case. There were other investigations.

THE COURT: I don't know anything about them. I don't think they are in the presentence report here.

MR. HUNDLEY: I think there is some mention of one of them, your Honor.

THE COURT: Of course, they investigate everybody from time to time. They have been —

MR. HUNDLEY: I think they have exceeded — they have outdone themselves as far as Mr. Moore is concerned.

THE COURT: They investigated me. That is par for the course.

MR. HUNDLEY: In my opinion he is the most warm, decent, caring human being, as attested to by his family and service and things of that nature. Let me move on.

I know that the practice here is that the defense goes first and the Government goes after them. And I know that Mr. Savage is finally going to be given his opportunity to address this Court on his view of the severity of the crimes and whatnot. All I want to say on that, your Honor, because, we had an awful lot to say about it yesterday; and I don't, you know, want to redredge it up again.

THE COURT: The Government is tied down a little bit by their plea agreement on what they say.

MR. HUNDLEY: I know. They agreed that they would not make any recommendation to the Court, but I have a feeling that Mr. Savage may get a little carried away, with all due deference.

MR. SAVAGE: It happens, I suppose.

MR. HUNDLEY: Let me say, and I don't want to rehash everything I said yesterday, your Honor, but I do want to point out, you know, that all of the charges in this case, you know, except, you know, the extortion charge; and as your Honor pointed out at the sentencing hearing, that's that, you know, rather nebulous color of right, extortion charge brought by the victim, Kizer. But all of the basic charges here concern themselves with, you know, the misuse of campaign funds, cash campaign funds, and even the Leaberry, you know, obstruction count, which we really have not contested. Even in that, which is in the presentence report and in so many of the filings that the Government has made, that, you know, what they were talking about basically on that tape, again, was $35,000, whether or not $35,000 cash, campaign contributions were in the 1988 campaign. That's what they were talking about, $35,000 cash campaign contributions.

The whole, you know, underlying, you know, that rush of the charges, you might say, is basically characterized, you know, in Count 1 by the Government, you know, the so-called underground campaign, $100,000 that went down to the counties, your Honor. I mean, all of that information they got from Mr. Moore and I. We told them about that, how the money was used down in those counties. Mr. Moore did not invent underground campaigns. I'm not saying they are right, your Honor, but underground campaigns in West Virginia were going on back when Jack Kennedy ran in the primary and I was working for him down here. Both parties have used it.

I'm not saying, you know, that maybe, you know, it should be done, but they counter balance. They both use it. I mean, sure, they have a state law in West Virginia that prohibits cash contributions from individuals in excess of $50. Your Honor, with all due respect, that law has just been honored in the breach. And, you know, for the Government to suggest – every time I bring up this to the Government, they come back and say, "We don't allege that he bought the election."

THE COURT: I don't disagree with you that it is honored in the breach. I think that's the trouble. Either they ought to do away with the law or else they ought to get a state law enforcement body in West Virginia who will prosecute the law. The difficulty is they dump everything on the Federal Government and they become the most unpopular people in the world.

MR. HUNDLEY: Yes, sir. But for the Government to suggest that, you know, somehow Mr. Moore bought the 1944 –or '84 election, is just preposterous. Their answer to that is we didn't allege that. But, God, that is what every media program and, you know, the press releases and the leaks suggest. Those are all democratic counties down there and in '84 he never even carries those counties. I mean, that is a terrible inference and suggestion to make that this man bought that election. It's just absurd.

That money is given to the campaign, county campaign managers down there. We used – in the old days we used to call it walking around money, you know. You know, it's those kind of inferences and suggestions that, you know, I just think are so unfair and so terrible. And, you know, then simply for the Government to say, "Well, we didn't charge that," you know. I just want to make it clear that these charges are not of the magnitude that some people are trying to make them out as.

And to get to the guts, I guess, of my argument is that basically the whole plea agreement was, you know, built around the fact that only one count, you know, was going to be a guideline count and, you know, that was going to be the obstruction of justice count. And Mr. Campbell and I pretty well agreed that it would be so structured so that it would be in the lowest guideline. And the probation officer has

agreed with us and that's in the guideline range 12, which is a mandatory 10 to 16 months.

Now, you know, I think your Honor understands why we, you know, in light of the motion to withdraw and everything, why I did not submit a written version of our offense, which I did not; but I believe what I have just stated would be basically our version of the offense. And I want to point out most respectfully to the Court that I have very consciously by all the papers I have filed and all of the argument I have made, that I have never challenged the guideline obstruction of justice count, which is really the guts of the Government's charge. I have never challenged that and I would hope the Court would infer from that and from what I'm saying now that we never backed away from accepting responsibility under that count.

And that, of course, would — if the Court agreed that would lower the guideline down two levels, which would make it 6 to 12 months. And that's what I know the Court's hands are — I don't want to use the word tied, but, you know, the Supreme Court has upheld the guidelines and I know that the Court has to sentence under those guidelines. And I would respectfully urge that they are the appropriate guidelines for sentencing.

THE COURT: I take it, then, that you do object to the portion of the presentence report under paragraph 61, I believe, that — where he states the defendant is not given a two-level decrease for the acceptance of responsibility. He points out here that the reason or the acceptance of responsibility is Mr. Moore's failure to provide voluntary and truthful admissions to the authorities of his involvement in these offenses.

Now, on — under paragraph 54, he states, he refers to the fact that a defendant is prepared to file a motion in an attempt to withdraw his plea of guilty, and then he states based on this information, it appears the defendant has failed to accept responsibility for the instant offense.

I have difficulty in interpreting that.

MR. HUNDLEY: I think there may be —

THE COURT: I think that as to the failure to — or the filing of the motion to withdraw, that's permitted under the Federal Rules.

MR. HUNDLEY: Yes, sir.

THE COURT: And I don't think a person can be penalized for filing. It's true, it came very belatedly, but the law does not state that it has to be definitely filed within a certain number of days after the plea of guilty is entered. But, of course, there is — if he failed — if he failed to cooperate, and on that subject the burden would rest upon the Government if he failed to cooperate and in connection with testifying and so forth at a later time. That would be lack of cooperation. Whether that would affect the acceptance of responsibility, I'm a little bit at a loss; and that's the only confusing thing in this very excellently-prepared presentence report.

MR. HUNDLEY: Yes, it was excellently prepared.

THE COURT: Other than that, I'm lost on that subject.

MR. HUNDLEY: Our legal position is, which I conveyed to Mr. Kuklar, and I agree he did an excellent job — our legal position is that if you accept legal responsibility or responsibility, legal responsibility for the obstruction count, which is the only guideline count, that that is sufficient to move it down the two levels to six months. And that you don't have to —

THE COURT: Well, 6 to 12.

MR. HUNDLEY: 6 to 12, I misspoke myself. But it would not be necessary because, you know, we are clearly not accepting responsibility for the other four counts, but I don't think that's necessary. That's our legal position and I believe we are right. Mr. Kuklar did not say we were wrong. What Mr. Kuklar said is your Honor will have to be the ultimate determiner of that. Maybe we can resolve this. The Government might agree with me. I don't hear any agreement.

MR. SAVAGE: Do you want me to address acceptance of responsibility at this point, your Honor?

THE COURT: No, I'll hear from you later.

Now, one other matter — at least one other matter.

MR. HUNDLEY: Yes, sir.

THE COURT: I gave to you this morning when you presented to me the medical reports on Mr. Moore's condition, which report I will be glad to turn over to the probation officer to be attached to the

presentence report. But I gave to you what — I told you, and which is correct, that yesterday after we finished our session, Mr. Kuklar had placed in Judge Knapp's office a large —

MR. HUNDLEY: Yes, sir.

THE COURT: — Manila envelope with — for my name and in that was the presentence report. And accompanying that is a memorandum prepared, apparently, by the Attorney General of West Virginia or someone in that office in which they want me to put about four or five million dollars in trust to await some claims that the State of West Virginia may have. I don't know what standing the State of West Virginia has in a criminal case at this time on the subject of restitution. I know, of course, that under the congressional act of the Victim Impact and Restitution Act that we have involved, that it's the Court's duty to determine whether restitution is due and owing to anyone. I don't know when Mr. Kuklar got this. When did you get it, sir, if you remember, this document from the State of West Virginia?

PROBATION OFFICER KUKLAR: I believe I received that Friday, Friday or Monday.

THE COURT: Last Friday?

PROBATION OFFICER KUKLAR: Right.

THE COURT: I don't know what the state intended for me to do, and I assume they will advise me in due time. What is the position of the defendant with respect to these claims?

MR. HUNDLEY: Very simple. As far as we are concerned, they have absolutely no standing in this matter. You know, there is nothing in the charges involved here that mentions anything more than I think under Count 1, which was the governor's salary; and, quite frankly, we would even — even oppose that because it would just seem to me that, number one, when the Government decided not to pursue the RICO, they had pretty well given up on all of this forfeiture stuff anyway. And as far as the governor's salary is concerned, they would have to make an absolute showing of, you know, under the "but for" position, you know, but for the underground campaign, you know, and whatnot, notwithstanding the guilty plea, that would not remove even the Federal Government from their burden of showing that the

governor's salary was somehow related to this underground campaign. And that's right in the indictment.

THE COURT: The Federal Government has no interest in this?

MR. HUNDLEY: I don't know, I haven't heard from them.

THE COURT: I can't imagine how they have any interest.

MR. HUNDLEY: Maybe they don't. Maybe they don't.

THE COURT: If they do, they have just gone in cahoots with the Attorney General's office of the State of West Virginia.

MR. HUNDLEY: It may be my position, and maybe the Government will give me a break and say they are not interested in that. And if I am right in my legal position, and I am sure I am, if they don't have any standing, my God, what does the State of West Virginia come off trying to horn in on the act?

THE COURT: My difficulty is that I don't have any law to either support you or to be opposed to you on the subject. I must —

MR. HUNDLEY: I don't, either, your Honor.

THE COURT: I must concede the Attorney General's office has really come up with a unique situation whereas they want to evaluate now the fair rental costs of the use of the governor's mansion for four years and things such as that and have me order that by way of restitution. It seems a little bit farfetched in my opinion on that line.

MR. HUNDLEY: It is ridiculous.

THE COURT: But I'm speaking now about the 500 some thousand dollars that was involved under Count 2.

MR. HUNDLEY: Well, under Count 2, your Honor, the theory of the indictment is that the master victim, Kizer, is the victim of the extortion, but the Government has always represented to me consistently that they would never, never ask the Court to return that money to the ubiquitous Mr. Kizer.

THE COURT: Well, I suspect they probably have some valid reasons for not urging that, perhaps, but here is a third —

MR. HUNDLEY: If Kizer has no —

THE COURT: Here is a third party who has come into the picture and they say, "We are entitled to that 500 some thousand."

MR. HUNDLEY: They might well be from Mr. Kizer, I don't know. I just don't know. There again, there's no admission that the money went back.

THE COURT: Why would –

MR. HUNDLEY: That he wasn't entitled to do that. I don't know.

THE COURT: Why would they conceivably be entitled to recover from Kizer?

MR. HUNDLEY: I don't know. They would have to prove – I mean, there would have to be some kind of a factual hearing to establish that Mr. Kizer wasn't lawfully entitled to that refund. You know, from the evidence and whatnot –

THE COURT: I believe he has got a pretty good argument. I take it you oppose the State of West Virginia's claim.

MR. HUNDLEY: I oppose the great State of West Virginia; yes, sir.

THE COURT: All right, anything else?

MR. HUNDLEY: No, sir.

THE COURT: All right, thank you, sir. Mr. Savage?

MR. SAVAGE: Yes, your Honor, unless the Court specifically requests, I'm not going to get in between the dispute between Mr. Moore and the State of West Virginia on that restitution issue unless the Court has questions on our view of it.

THE COURT: Do you take any position for the United States Government on this question?

MR. SAVAGE: Your Honor, our position would be as follows. The salary of the governor's office was obtained by fraud by Mr. Moore's admission in Count 1. That is an easily calculable number. It is $279,000 for the four years. That ought to be repaid to the state. Beyond that, the United States does not –

THE COURT: And under what theory do you proceed?

MR. SAVAGE: Under Title 18, Section 3664 requires the Court to make a finding if it's practicable to do so –

THE COURT: Well, my finding would be that the people of West Virginia gave that salary to Mr. Moore pursuant to law.

MR. SAVAGE: Okay.

THE COURT: Didn't they?

MR. SAVAGE: The United States's view is that Count 1 says, and Mr. Moore admitted with his plea of guilty, that they did not give it pursuant to law. In fact, it was illegal. He fraudulently obtained the office and should not be allowed to retain the benefit derived therefrom. Count 1 is specific.

THE COURT: You mean he fraudulently obtained the office because he accepted some campaign funds that were not accounted for?

MR. SAVAGE: He illegally accepted $100,000 cash. He illegally spent it by buying votes and he illegally lied about it by filing false tax returns, false campaign statements. Mr. Hundley is incorrect when he represents to this Court that it is not the position of the United States that Mr. Moore bought that office. He absolutely bought it.

THE COURT: I take it you are in accord with the views of the State of West Virginia.

MR. SAVAGE: On the salary issue, yes, $279,000.

THE COURT: Well, good luck in the Court of Appeals.

MR. SAVAGE: Okay. I take it you are not in accord.

THE COURT: I certainly am not.

MR. SAVAGE: Okay.

THE COURT: If you were going to put on President Bush, if he does something that you disagree with, and so you want to charge his government, charge him for his salary by reason of fraud, is that it? I mean –

MR. SAVAGE: No, it is the particular nature of that crime, your Honor.

THE COURT: I'm sure that the Republican party – there were people in the Republican party, I am sure when President Bush was elected, that gave monies that were illegal campaign funds. Would you like to wager on that?

MR. SAVAGE: No. I'm with you on that one, Judge. Well, not to go too far afield on the hypothetical, but I suppose it depends upon the state of mind of the recipient of the illegal funds, and I wouldn't want to speculate on that.

The other factual or, actually, it's a legal issue I want to address before I make my other remarks, is this issue on the legal mechanism the Court should adopt in assessing acceptance of responsibility. All that Mr. Hundley has asserted is that his client plead guilty. The guidelines on the commentary are specific that pleading guilty alone does not equal acceptance of responsibility. It then enumerates the sorts of considerations. And this Court is, of course, familiar with it as to what ought to be looked at to determine acceptance of responsibility. And those things include things like voluntary, truthful testimony by the defendant, voluntarily ceasing his criminal conduct, immediately coming forward and personally indicating his responsibility for what he did.

And I think it's — can be shown in a nutshell that Mr. Moore has not done that because on May 3rd he took this witness stand in the Ellis trial. And he was asked the specific question and he ducked it. He was asked, "Are you pleading guilty because in truth and in fact, you are guilty?" And his response is utter double speak. It's, "I'm pleading guilty in terms of these charges. They substantially represent violations of the law of the State of West Virginia — or, excuse me, the United States." In other words, he can't suck it up and say, "I did it."

And that's what acceptance of responsibility is all about because the section says that it's designed to reward people who "demonstrate sincere remorse." And if there is one thing missing from that man, it's remorse. So, I think the legal analysis the Court has there leads inevitably to the conclusion that the acceptance of responsibility is not warranted here.

THE COURT: What did the presentence officer — what did the probation officer find on this? I can't make it out whether he thinks Mr. Moore did accept responsibility or did not; and if he did not, has he penalized him?

MR. SAVAGE: He has not rewarded him for acceptance of responsibility. And it's not a penalty, your Honor; it's a reward.

THE COURT: But he doesn't reward him for acceptance of responsibility because he filed this motion which I denied on yesterday.

MR. SAVAGE: That's right. And I am not sure and I'm comfortable that that's not the way to approach this. In other words, the filing of the motion, although it doesn't exactly represent remorse and apology and et cetera, ought not to be a reason to deny him acceptance of responsibility. It's an exercise of a constitutional right, or at least a statutory right.

THE COURT: Now, if that be the case, I have got to have some evidentiary hearing, then, as to what his lack of cooperation is because the burden is clearly on you; isn't it?

MR. SAVAGE: It is, your Honor. And if the Court wants to take evidence on that issue today, we are prepared to put it on. Or if the Court wants to hear my proffer and inquire of Mr. Hundley as to whether it's factually inaccurate or whether we have merely drawn the wrong conclusion, we can proceed that way, whatever the Court prefers.

THE COURT: I don't know, I haven't the slightest idea. Is it in connection with testimony he gave at a trial?

MR. SAVAGE: It breaks down into –

THE COURT: If it is merely because he didn't give a verbatim statement of what you thought he should have stated, just don't bother me with that phase of it because it's difficult to convince the United States Attorneys that they ought to testify, perhaps, to the truth, but the truth might be a little bit different than what the United States Attorney thinks.

MR. SAVAGE: I understand the mere factual variation is the run-of-the-mill occurrence in this job, and that's not what the Government's premise is. First, the Government's premise is he has denied the four underlying counts of the obstruction. He says they factually didn't happen. And those are the things he was obstructing. So there is no acceptance of responsibility there. He was then asked point blank in interviews, "Where did the hundred thousand dollars come from for the underground campaign?" And he was able to identify or willing to identify a pittance, 20 some odd thousand dollars.

The rest, those people walked free because that man won't tell us. He's –

THE COURT: Now are we talking about before or after the acceptance of the plea of guilty?

MR. SAVAGE: After the acceptance of the plea of guilty. To this day, as we sit here today we don't know where that money came from because he won't tell us. He won't cooperate. He won't accept his responsibility.

The next point is his failure when questioned under oath about whether he was in truth and in fact guilty, to directly admit that he was in truth and in fact guilty.

The next area involves the fact that he had to be – has been confronted with a transaction that he was –

THE COURT: Well, that last point you have raised is the very thing that I denied on yesterday. I mean, that is a question – are you going to penalize him for filing a return that the law permits him to – not a return, but a motion.

MR. SAVAGE: I'm sorry. I wasn't making myself clear, your Honor. This testimony under oath where he doesn't admit that he committed the crimes occurred before he ever filed the motion to withdraw his plea. This occurred on May 3rd. It occurred before he plead guilty. Within five days of his guilty plea he still was not accepting personal responsibility, demonstrating the sincere remorse that the statute requires, to award him those two points.

THE COURT: Well, does the acceptance of responsibility – isn't that effective as of the date he enters his plea?

MR. SAVAGE: It is.

THE COURT: Because if that – if otherwise, you have never gotten the truth out of everybody that you interviewed the first time. You know that.

MR. SAVAGE: It's a problem.

THE COURT: Isn't that true?

MR. SAVAGE: Yes. There is no question.

THE COURT: So they all ought to be denied acceptance of responsibility according to you.

MR. SAVAGE: That is not accurate, your Honor, because this statement hasn't changed since he plead. It is not like he is now saying, "I personally accept responsibility." He's got his lawyer waffling around here saying, "Well, we never denied the obstruction completely." That's not it. That doesn't get it. That's not sincere remorse. That is sincere nonsense.

THE COURT: Where does the regulation define what sincere remorse is?

MR. SAVAGE: Define?

THE COURT: Define. How do you define it?

MR. SAVAGE: I define it as a person who stands up and says, "I did it and I'm sorry. I apologize."

THE COURT: Didn't he say this on May 8th?

MR. SAVAGE: He has never said he is sorry his entire life, Judge.

THE COURT: I didn't ask him if he was sorry.

MR. SAVAGE: I know you didn't, and you are not required to ask him. For him to accept responsibility, he is required to come forward and do it.

THE COURT: Well then, you should have gotten up and told me, "Judge, he has not answered." I asked you if there was anything more and you said, "No, you have fully covered it, Judge."

MR. SAVAGE: You did.

THE COURT: And –

MR. SAVAGE: You fully covered every requirement the law required to take a plea.

THE COURT: I am only interested in after he entered his plea of guilty on May 8th.

MR. SAVAGE: Right.

THE COURT: Everybody charged with a crime does some lying to start with and you know it and I know it.

MR. SAVAGE: And he has continued it to this day. That is the point, your Honor.

THE COURT: It would be the rare situation in which the first one interviewed when you start interviewing and he tells the verbatim truth as to what happened.

MR. SAVAGE: That is right, that is right. The problem in this case is there is lying to start with and lying to end with.

THE COURT: Well, don't worry about the start. Let's get with the end.

MR. SAVAGE: Right. All I can say, I can repeat the fact he hasn't told us the truth about where that hundred thousand dollars came from. We inquired of him concerning a transaction where we have irrefutable evidence of him obtaining a car from C&O Motors. Let me outline the evidence we have and let me tell you what he says about it and the Court can assess if we have truthful action.

In 1978 the man is a candidate for the governor of the State of West Virginia. He goes to C&O Motors where he got cars in the past. He gets the car and the dealer gets the money. Not when he is a candidate in 1984. He goes down and takes a car for the "test drive," according to the dealer, and drives it away for four years, never pays for it, didn't pay one nickel until he was confronted.

THE COURT: But these are facts that you well knew of at the time he plead guilty.

MR. SAVAGE: Absolutely.

THE COURT: And this is a car of what you tried to slip in improperly, you and Mr. Ellis, to me. Now, I'm not interested in all of Mr. Moore's sins. You have charged him with five sins. Stick to that.

MR. SAVAGE: My difficulty, your Honor, with sticking to that for the purposes of acceptance of responsibility is although we charged him with five sins, we have asked him to admit the others. And he won't do it.

THE COURT: You cannot under your plea agreement prosecute him for the others.

MR. SAVAGE: We can't – right, we can't. We want to prosecute any other wrongdoer he was associated with. He has an obligation to help us do that. He hasn't done it. He won't tell us the truth, whether it's the underground campaign, whether it is the stolen car from C&O Motors. He won't tell the truth.

THE COURT: Well, if you are interested in finding out who loaned him that car for four years and then he finally bought it, why don't you go to those people and find out?

MR. SAVAGE: We have got their version. We know what they say.

THE COURT: All right, then what else do you need?

MR. SAVAGE: What we need if there is going to be a two-point reduction in his sentence is acceptance of responsibility and cooperation and admission.

THE COURT: But you haven't charged him with that and you cannot now charge him with it.

MR. SAVAGE: That is right. And the fact the charging ability of the United States, your Honor, with all due respect, doesn't enter into the consideration as to whether he's been, as the plea agreement requires, completely truthful and cooperative. In fact, the ordinary expectation in a plea agreement case is that the fellow will cooperate about the other stuff. We don't need him to cooperate so much on what he's charged with.

THE COURT: Has he declined to testify in any case in which he was subpoenaed?

MR. SAVAGE: No.

THE COURT: Has he testified?

MR. SAVAGE: Yes.

THE COURT: How many cases?

MR. SAVAGE: He testified in one trial, and I believe his testimony was truthful.

THE COURT: You believe his testimony was the truth?

MR. SAVAGE: I do.

THE COURT: All right. Then what are you complaining about?

MR. SAVAGE: I am complaining about Mr. Moore's, A, refusal to accept responsibility for the offenses; and, B, lack of cooperation as demonstrated by the fact that he selected one isolated case to tell the truth and has lied about everything else. That's the complaint.

THE COURT: But you can't prosecute him.

MR. SAVAGE: We are not here to prosecute him, your Honor. We are here to get you to say, "Wait a minute. This guy doesn't get any special benefits from the Court, any rewards for lying to the Government," because that is what they are asking for. They want, you know, a laurel halo or something for not telling us the truth, for not accepting responsibility. That's all. We are not saying, "Put him in prison for the car," or, "Put him in prison because he didn't tell us about the underground campaign." We are saying, "Don't give him a present."

THE COURT: Why don't you call before a grand jury whoever you suspect might be involved in whatever the particular action may be and ask them point blank the questions.

MR. SAVAGE: We have and will.

THE COURT: Well, he has answered them, hasn't he?

MR. SAVAGE: Moore?

THE COURT: Yes.

MR. SAVAGE: I am sorry, we haven't called him before a grand jury yet. We will and our assumption is he'll answer.

THE COURT: I am not interested in what "We will." I am interested in his level of responsibility now.

MR. SAVAGE: I am, too. I mean, he has not been before a grand jury, but that is not his fault. I mean, we have not called him to appear before a grand jury.

THE COURT: All right. And — well, you may be entitled to a factual hearing as to that point and I'll have to — however, you have made your proffer. I'll hear from Mr. Hundley whether he wants to accept the proffer or whether he wishes the factual hearing.

It is my duty under Rule 32, gentlemen, to either make a finding or otherwise find that it would make no difference in the sentence.

Now, in this case there is a difference in the sentence because under that Sentencing Reform Act of 1984, we have a range, I believe, of what, 10 to 16 months, I believe, if there was was not an acceptance of responsibility.

MR. HUNDLEY: Yes, sir.

THE COURT: Whereas in — and this only applies to the last count. It doesn't apply to the other count. Whereas we have a range of 6 to 12 months if there be an acceptance of responsibility by Mr. Moore.

MR. HUNDLEY: Your Honor, we do not accept the proffer of Mr. Savage. I'll just make these brief comments why.

You know, apropos, the 19 — we are talking about the 1984 underground campaign, which was, you know, six years ago. And we did — we were the ones, Mr. Moore and I, who told the Government that it existed. And we gave them the names of numerous people who had contributed to that campaign. Now, the fact that we can't remember, you know, everybody who made some contribution to a 1984 campaign, I just don't think that is unreasonable, particularly when we were the ones who told them about it and who offered the fact that we got so much from this gentleman and whatnot.

THE COURT: Well, direct your attention, if somebody gave me free use of an automobile for four years, I think I would remember the name of that individual.

MR. HUNDLEY: Yes, that is right. The car is entirely different and we have been through this a thousand times with the Government. This is a car that Mr. Moore drove — didn't drive once, sat, you know, in the garage up here. He never drove the car. Nobody drove the car. This is a real red herring, this charge, Judge.

THE COURT: Where was the car lodged in the garage?

MR. HUNDLEY: Lodged in the garage at the mansion.

THE COURT: At where?

MR. HUNDLEY: At the mansion, never used.

THE COURT: Well, if Mr. Moore put it there, can he hide behind the fact that he put it there and it belonged to somebody else?

MR. HUNDLEY: No, and we are not hiding behind that, your Honor; honestly, we are not.

THE COURT: Can't you give us the name of that person?

THE DEFENDANT: They know the name.

MR. SAVAGE: We know the name.

THE COURT: What are you complaining about then, Mr. Savage?

MR. SAVAGE: What I am complaining about, your Honor, and it's in utter sincerity, is what we want to know is the nature of that transaction. What Mr. Moore told us happened is he got a car and he forgot to pay for it. That's silly. That's absurd. Nobody forgets to pay for a car. That is a lie. We are entitled to know whether he was bribed, whether he extorted that car, whether he stole it. He is required to cooperate with us to determine whether there are other prosecutions to be done in that case. He won't do it. "I forgot." It's like saying he robbed the bank and forgot it is illegal. That's wrong. That's nuts.

THE COURT: I can't make Mr. Moore testify to anything other than what Mr. Moore knows.

MR. SAVAGE: Or wants to say.

THE COURT: No, I didn't say that.

MR. SAVAGE: What you said is true, your Honor. He can't testify to what he doesn't know.

THE COURT: You say he is lying or he hasn't told the truth.

MR. SAVAGE: Right.

THE COURT: Who do you have to prove otherwise? Because the burden is on you.

MR. SAVAGE: Right, all I have, your Honor, is common sense. In other words, I have laid out the undisputed facts as to what happened with that car. I have laid out the undisputed fact that he won't tell us about the underground campaign money. I have laid out the fact that he denies to this day the five counts. Those points, to me, sum up to a person who ought not to be rewarded by the Court.

THE COURT: Well, let's have the factual hearing. You may proceed in the presentation of the evidence.

MR. SAVAGE: Your Honor, if it will expedite matters and, perhaps, I am misreading the tenor of the Court, but I have made the proffer as to the entirety of what our evidence would be. If that's not going to be sufficient, if proven, then we are willing to retreat at this point on that issue.

THE COURT: Mr. Hundley stated that he would not accept your proffer, so we are now back to the burden is on you.

MR. SAVAGE: Right. My point is, your Honor, if you accept our proffer and it is still not going to make any difference —

THE COURT: I am not accepting any proffers by anybody in this case unless there is agreement.

MR. SAVAGE: I misphrased it, your Honor. If you accept our evidence that we are about to put on, but it is still not going to make any difference, we are prepared to live with that.

THE COURT: I am not going to prejudge your case.

MR. SAVAGE: Your Honor, we would call Special Agent Kuhn of the IRS.

THOMAS L. KUHN

was called as a witness on behalf of the Government, was sworn, testified as follows:

THE COURT: Please state your full name, sir, and spell your last name.

THE WITNESS: Thomas L. Kuhn, K-u-h-n.

DIRECT EXAMINATION

BY MR. SAVAGE:

Q. Mr. Kuhn, where do you work?

A. I work for the Internal Revenue Service, Criminal Division.

Q. And how long have you been doing that?

A. 25 years.

Q. Okay, have you had some responsibility related to the investigation of Arch A. Moore, Jr.?

A. Yes.

Q. Okay, and were you what is known as the case agent on the case?

A. Yes.

Q. Okay, and in that capacity, have you been the person that has been charged with the responsibility of overseeing the entire investigation and keeping yourself up-to-date with everything that has happened?

A. Yes.

Q. Was there an area and a time during the course of this investigation, Mr. Kuhn, where you or other agents discovered some evidence relative to Mr. Moore obtaining a car from C&O Motors?

A. Yes.

Q. Okay, and what exactly as best as you recall did you do in terms of the investigation of the C&O Motors incident?

MR. HUNDLEY: Your Honor, I am going to object to this line of inquiry because it – you know, I don't think that it goes to the issue of responsibility. And, you know, he is just trying to get in through the back door all of this evidence.

THE COURT: How do I know what it goes to until I hear it?

MR. HUNDLEY: All right. May I have a continuing objection to this? I will continue to object as I think it gets irrelevant.

THE COURT: I don't know what we are getting into until I hear the evidence.

MR. HUNDLEY: I predict that is what they are getting into.

THE COURT: That may well be true.

BY MR. SAVAGE:

Q. And, Agent Kuhn, did you do some interviews relative to C&O Motors?

A. Yes.

Q. And did you determine that Mr. Moore obtained a car in 1984?

A. Yes, sir.

Q. All right, would you relate the circumstances.

THE COURT: Are we talking about interviews with Mr. Moore or are you now —

THE WITNESS: No, sir.

THE COURT: You might have talked to me about it, but that is hearsay, isn't it?

MR. SAVAGE: It is, your Honor, absolutely.

THE COURT: Well, I let in hearsay?

MR. SAVAGE: Yes, your Honor. *United States vs. Fatico*, a Second Circuit case. This Court at sentencing can rely on hearsay evidence to make determinations of the appropriate sentence.

THE COURT: I guess maybe you are right on that.

MR. SAVAGE: Your Honor, I won't tell anybody if you don't.

MR. HUNDLEY: Your Honor, I object, although he may be right on the case and that would be an exception to the hearsay, this is now established it is clearly beyond the scope of the evidentiary hearing. You can — he can testify to any interviews that he had with Mr. Moore. And he was at all of them, I'm sure of that. But now to be testifying hearsaywise to extraneous matters that are no part of the charge and no part of accepting responsibility on Count 5 —

THE COURT: I'll hear him for what it is worth, but I am not saying it is worth anything.

BY MR. SAVAGE:

Q. Mr. Kuhn, would you relate to us what your interviews with the people at C&O Motors and Mr. Moore's staff revealed about his obtaining a car in 1984?

A. The president of C&O Motors, Jim Love, was interviewed. Jim Love related that a car was provided to Governor Moore prior to his being elected governor in 1984. And according to Mr. Love, this occurred in the spring of 1984.

Q. What was Mr. Love's understanding of why he was providing Mr. Moore this car?

A. He received a request that the governor wanted to purchase a vehicle for his wife. And he wanted her to test drive that vehicle. And

Jim Love provided – told him he had an Olds 98 Regency that was available that he might be interested in.

Q. Okay, and had Mr. Love had dealings with automobiles with Mr. Moore in the past?

A. Yes.

Q. And had those been the ordinary customer/car dealer relationships when the customer gets a car and the dealer gets paid?

A. Yes.

Q. Did Mr. Love provide this vehicle in the spring of '84?

A. Yes.

Q. And did he get paid?

A. No.

Q. Okay. Did he make any efforts from 1984 to 1988 to get paid?

A. Yes.

Q. What did he do?

A. He had Mr. Ong – Mr. Ong is an employee of C&O Motors, had him contact Governor Moore's secretary – this is prior to the governor being elected – concerning the vehicle. After the governor was elected, contact was made as to what they were going to do about the car. There was some discussion as to Governor Moore's purchase of the vehicle and there was discussion over, perhaps, the state could lease the vehicle. This discussion went on for a period of time, I believe, after the governor was inaugurated in January of 1985. There was additional discussions concerning the lease.

Paperwork was drawn up for the lease, but they were never – they were taken to the governor's office. They were never executed and there was additional phone calls made by C&O Motors personnel as to what they were going to do about the vehicle with the governor's executive secretary, Miss Toler, Audrey Toler.

THE COURT: What did you do after the investigation started and after the indictment was returned against Moore?

THE WITNESS: I'm sorry, your Honor. I don't follow you.

BY MR. SAVAGE:

Q. Did you interview Moore on this subject?

A. Yes.

Q. Okay.

THE COURT: When?

THE WITNESS: Governor Moore was asked about the vehicle during the deposition prior to the indictment and his plea, and there was a subsequent interview with Governor Moore on May 30th of 1990 in which the subject of the vehicle was brought up.

BY MR. SAVAGE:

Q. At that time — well, to complete the scenario back in '88, after he lost the election in 1988, did he have a discussion with Jimmy Love or C&O Motors about finally paying for this car?

A. Yes.

Q. And what was that discussion?

A. A phone call was made to the governor in which there was a discussion concerning the ultimate purchase of the vehicle or the payment of the vehicle. And Jim Love contends that the governor indicated to him, "What are we going to do about this car?" And Jim Love relates to us, he said, "I'm going to get paid."

Q. Love says to the governor, "You are going to pay me"?

A. Right.

Q. And what is Arch Moore's response to that?

A. He said, "Let me know how much you want me to pay and I'll pay."

Q. And what does Love tell him he wants to be paid for the new car that he hasn't been paid for?

A. $10,000.

Q. Okay. And was there a discussion between Mr. Moore and Mr. Love as to why they were only paying 10,000 for what had been a brand new car?

A. I believe Jim Love related that the governor indicated that he didn't want to pay the full price for the vehicle because it was now a used vehicle.

Q. They agreed – he agreed to pay less because he used this vehicle, then you indicated to the judge that you interviewed him at a sworn deposition prior to his indictment in this case, which was in 1989, a year after he had agreed to pay; right?

A. Yes.

Q. Had he yet paid by the time you confronted him with the facts about C&O Motors?

A. No.

Q. Subsequent to that time when you confronted him and the other investigators confronted him with the fact that he committed this apparent crime, did he then pay?

A. At what point in time are you referring to?

Q. Has he ever paid?

A. Not to my knowledge.

Q. Did you interview him on May 30th as to what he was doing in terms of receiving this automobile for nothing?

A. Yes.

Q. And what did he tell you that transaction consisted of?

A. He indicated that he had obtained the vehicle, and we asked why he had not paid for the vehicle. He indicated that he and Jim Love were friends, that Jim Love told him, "Pay me whenever you get around to it. And don't worry about it."

Q. And that is inconsistent with the other evidence you have gathered in this investigation, right?

A. Yes, yes.

Q. Turning now, Mr. Kuhn, to the issue of the underground campaign, do you recall –

THE COURT: Wait a minute. Now in order to determine this, where is Jim Love? Is he in the audience?

MR. SAVAGE: He is not here at the Government's behest, your Honor. I don't see him, no.

THE COURT: You mean this is all hearsay? Mr. Kuhn doesn't vouch for it any more than what his testimony is.

MR. SAVAGE: No, the point, your Honor, I think not to fast forward ahead to Mr. Hundley, but there isn't much of the facts that are disputed there other than what Mr. Moore's mental state was in getting a car for nothing, and his story does not make any sense.

MR. HUNDLEY: Your Honor, there is a big dispute between the conversations between Mr. Love and Mr. Moore, all of which Mr. Moore has conveyed to the Government every time he has been interviewed.

THE COURT: All right.

BY MR. SAVAGE:

Q. Moving now to the underground or illegal 1984 campaign, Mr. Kuhn, did you conduct an investigation of cash that Mr. Moore received during the 1984 election campaign?

A. Yes.

Q. And prior to any interviews with Mr. Moore, did you interview Mr. Moore's campaign manager in 1984 and determine that there had, in fact, been sums of cash in that campaign?

A. Yes.

THE COURT: Now, when did we interview Moore and when did we interview his campaign manager?

THE WITNESS: Governor Moore's deposition was on January the 10th, 1990.

THE COURT: All right.

BY MR. SAVAGE:

Q. And the interview with the campaign manager was a matter of days before that?

A. A matter of days prior to that.

THE COURT: Isn't that the count that's involved in the indictment?

MR. SAVAGE: That is Count 1.

THE COURT: Is that Leaberry? That is not Leaberry?

MR. SAVAGE: No, this is Craig. Leaberry is on the obstruction. That is next, the campaign manager, the '88 campaign manager.

BY MR. SAVAGE:

Q. So we know about the cash underground campaign. He comes in and tells us some stuff about that on January 10th, right?

A. That's correct.

Q. He then repeats matters relating to that on April 9th?

A. That's correct.

Q. Okay, subsequent to his indictment and entering his plea of guilty and accepting an obligation to cooperate, did agents inquire of him as to where the $100,000 came from?

A. Yes.

Q. Okay, and do you recall as you sit here today how much of that money he was willing to account for?

MR. HUNDLEY: Well, again I object on "willing to account for."

THE COURT: How much did he account for?

MR. SAVAGE: I was going to ask him.

MR. HUNDLEY: I am sorry.

BY MR. SAVAGE:

Q. How much did he account for?

A. My best recollection was it was $23,000.

MR. SAVAGE: If I might have a moment, your Honor.

THE COURT: You refer to the Government's deposition. That was not a deposition. It was merely a statement by Mr. Moore under oath that was recorded, isn't that right?

THE WITNESS: That is correct, sir.

THE COURT: There was no pending litigation.

MR. SAVAGE: Sworn interview might be a better phrase, I think.

BY MR. SAVAGE:

Q. Agent Kuhn, at any time has Mr. Moore provided to the United States Government any evidence of any criminal conduct of which we did not already know?

MR. HUNDLEY: Well, I object to that question for obvious reasons.

THE COURT: I sustain that objection.

BY MR. SAVAGE:

Q. At any time, Agent Kuhn, has in your presence or in the presence of any other agents or investigators for the United States, in your opinion has Mr. Moore ever in the words of the sentencing guidelines demonstrated sincere remorse?

MR. HUNDLEY: Again, I object. This is an agent doing his job of conducting interviews. He is not there to assess remorse or sorrow or contrition. That is not his job. I wouldn't expect him to.

THE COURT: I sustain the objection.

MR. SAVAGE: Let me rephrase it.

BY MR. SAVAGE:

Q. Has he ever uttered any words that expressed apology or remorse?

MR. HUNDLEY: Objection again.

THE COURT: Can't we just take judicial notice of the fact that an Internal Revenue agent assigned to the Criminal Division would not particularly look with favor with various statements that would incline to indicate remorse?

MR. SAVAGE: No. I think his ears could hear it, your Honor. He may not accept it. But I think the agent is fully capable of recounting the fact that the guy never said it.

THE COURT: I don't know what he means by it. I don't know what you mean by it. People have different ways of reacting to remorse. I'm sorry I'm here, but there is nothing I can do about it.

MR. SAVAGE: Not half as sorry as some of us, Judge. I'll prolong your sorrow no further, your Honor. I pass the witness.

CROSS-EXAMINATION

BY MR. HUNDLEY:

Q. Mr. Kuhn, you were, I believe, present at every interview of Mr. Moore, at least where I was present; is that not correct?

A. Yes, sir.

Q. And isn't it a fact that every question, virtually every question that was asked to Mr. Moore, he did answer?

A. He gave an answer; yes, sir.

Q. All right now, let me first take this underground campaign. I am going to be very brief, your Honor.

You indicated that you went out and you interviewed, I believe, Mr. Craig, who was the '84 campaign manager?

A. That's correct, sir.

Q. That's correct. And isn't it a fact that originally on the underground campaign, that Mr. Craig lied to you people about where that money went? Or let me make it more specific. Didn't Craig originally take the position with the Government that that money didn't go into an underground campaign?

A. Yes.

Q. Yes, he did. And who was it that first advised you that there was an underground campaign and that money did go to Craig and then to Barber or down to the so-called counties, southern counties?

A. The deposition on January the 10th, the underground campaign, the first time I had heard that terminology used was used by Governor Moore.

Q. That is right. And then isn't it a fact that as a result of the voluntary disclosure by Governor Moore that there was an underground campaign in 1984, there was $100,000 in it, it goes to Mr. Craig, the campaign manager, goes to Mr. Barber, goes down to the counties. It's used to get the vote out and walking money, et cetera, et cetera; that all came from Mr. Moore, right?

A. I believe that he characterized it as the election day process.

Q. That is right. Excuse me. I should stay at the lectern. And isn't it a fact that after you got that information as a good agent, you went back and you confronted Mr. Craig with it?

A. Yes.

Q. And isn't it a fact that being confronted with the credible information that you got from Mr. Moore, Mr. Craig then changed his story?

A. That's incorrect, sir.

Q. That is correct?

A. That is incorrect.

Q. What is correct? Excuse me, what did Craig say after you confronted him?

A. Mr. Craig came in.

Q. With the information about the underground campaign –

MR. SAVAGE: Your Honor, if he could try and let him answer, do it one at a time, the old-fashioned way.

THE COURT: All right, do we have the question? Does he understand it?

BY MR. HUNDLEY:

Q. Do you understand the question, sir?

A. I believe so. If my answer doesn't respond to it, why, correct me.

You are correct. Mr. Craig did come in. He gave one story. He subsequently voluntarily came in and gave the correct story prior to talking to Governor Moore. The correct story was a correction of his prior testimony. And this was prior to talking to Governor Moore on January the 10th, sir.

Q. Right. But originally – but aren't you aware of the fact and did it not come out at the January 10th interview of Mr. Moore that it was Mr. Moore who had gone to Mr. Craig and said, "Mr. Craig, you go down there and tell those people the truth about the underground campaign." You were there when Mr. Moore said that, isn't that correct?

A. That's correct.

Q. And you have no reason to doubt that because Mr. Craig did come in and change his story, right?

A. I have trouble answering yes to that, sir.

Q. Well, answer it any way you want.

A. I have experience with the fact that the governor was not honest on January the 10th about certain facts that we knew that caused me to be concerned about other things he may have told us.

Q. Yeah, but there isn't any doubt that when Craig came in as a result of being contacted by Mr. Moore and changed his story to coincide with Mr. Moore's story, you certainly believed Mr. Craig the second time, did you not? There isn't any doubt about that, is there?

A. That is correct.

Q. That's right. And that was as a result of the cooperation of Mr. Moore. Is that not a fair inference, sir?

A. That's a fair inference.

Q. Thank you. And is it not a fact that Mr. Craig was rewarded by the Government? He was given a grant of immunity, wasn't he?

MR. SAVAGE: I'll just object to the form of the question, your Honor, reward or grant of immunity.

MR. HUNDLEY: I withdraw the use of the word reward. That is improper. Let me withdraw the question.

BY MR. HUNDLEY:

Q. Isn't it a fact that Mr. Craig was granted immunity?

A. Yes.

Q. And, in turn, Mr. Moore was indicted on Count 1 for the underground campaign?

A. Yes.

Q. Let me go back just very briefly, your Honor, to the automobile, Mr. Kuhn. You were present, as I say, at every interview that I was present at of Mr. Moore. And is it not a fact that at every one of those interviews, Mr. Moore was questioned about this automobile?

A. Yes.

Q. There might have been one he wasn't?

A. Yes.

Q. But he was questioned about it several, several times?

A. Yes.

Q. And he always answered every question on it?

A. Yes.

Q. And he always maintained the same position on it, did he not?

A. Yes.

Q. And he always disputed the version that Mr. Love gave, isn't that correct?

A. That's correct.

Q. And that's, as far as you know, still his position?

A. As far as I know; yes, sir.

Q. And isn't it a fact that at the last interview that I was present at where there were – besides yourself, there were some FBI agents present, whom I had not met before, that there was again even a heated discussion about the car again; isn't that right?

A. Yes.

Q. I don't think you participated in the heated discussion. You had questioned him – had questioned before about it, but there was a heated discussion; and is it not a fact that again Mr. Moore just asserted his position, which happens to be contrary to Mr. Love's in substance about the car?

A. That's correct.

MR. HUNDLEY: I believe that is all I have.

MR. SAVAGE: Just one, your Honor.

REDIRECT EXAMINATION

BY MR. SAVAGE:

Q. Agent Kuhn, it is fair to say that Mr. Hundley has indicated that Mr. Moore told the truth about the '84 underground campaign. Is it not also fair to say that the '88 underground campaign that he thought was within the statute of limitations, he lied about?

A. That is correct.

MR. HUNDLEY: I object to his characterization.

MR. SAVAGE: That is all.

MR. HUNDLEY: I object to his characterization. I move to strike that.

THE COURT: Are we talking about the '88 or '84? I thought we were talking about the '84.

MR. HUNDLEY: I thought we were. I didn't ask him any questions on my cross-examination of '88 to open anything up on that.

MR. SAVAGE: He asked the agent about his relative ability to believe Mr. Moore about his campaign transactions.

MR. HUNDLEY: That was back in '84.

MR. SAVAGE: Right; the fact he lied about '88 because he thought it was within the statute of limitations reflects on his truthfulness in '84. Forget it, I will withdraw that question.

THE COURT: The question is withdrawn.

MR. SAVAGE: I have no further questions, your Honor.

MR. HUNDLEY: Your Honor, just one I forgot to ask, back to the underground campaign.

THE COURT: All right.

RECROSS-EXAMINATION

BY MR. HUNDLEY:

Q. You had indicated that we had only given you some $23,000?

A. On the January the 10th, 1990; that is correct, sir.

Q. At that time, but are you not aware that subsequent to that time, I called in different names and more information. I'm not saying I called you, but are you not aware of that, that I gave different names to Mr. Savage and different amounts?

A. I know that on the May 30th debriefing of Governor Moore, there was additional names mentioned; and that brought the figure up to roughly $33,500, if my memory serves me correctly.

Q. Yes. You are correct on that, but what I am asking you is in addition to that, are you not aware that I had phoned some names or different amounts in to the prosecutors? I am not saying I phoned it in to you, Mr. Kuhn. I didn't. I don't know whether you are aware of it or not. If you are not, you are not.

A. I honestly don't recall right now, sir.

Q. All right, all right. But in connection with the events that you are aware of, the names that were given back in 1984 and then the names in the January 10th interview, and then the names that were given in the May interview, he gave the names and his best recollection of the amounts?

A. He provided those names and the amounts that related to those names.

Q. He provided that?

A. Yes.

Q. The names and the amounts?

A. Yes.

MR. HUNDLEY: Thank you, sir.

MR. SAVAGE: I have nothing further of this witness, your Honor, or on the point.

THE COURT: Thank you, Mr. Kuhn. You may stand down. What is your next witness?

MR. SAVAGE: That is all we would offer on the point, your Honor, as to acceptance.

THE COURT: Does the defendant have any witnesses, Mr. Hundley?

MR. HUNDLEY: No, I don't have any. It is their proffer. I just think the proffer is insufficient. Their evidence is insufficient.

THE COURT: Anything else on the acceptance of responsibility issue?

MR. SAVAGE: Not as to that issue, your Honor.

THE COURT: And nothing from the defense?

MR. HUNDLEY: No. Again, as I say, your Honor, I think really the only issue your Honor has to decide is whether or not he is accepting responsibility under Count 5, which we have never contested. Now, I agree with your Honor that if the Government had made any showing that —evidentiary showing that he hadn't cooperated, that would have been enough. They just haven't made that showing. The only really tangible factor here is that immediately after the plea agreement was signed, they interviewed him right away. They were

very anxious to see if he could be a witness in the Ellis case. He did testify in the Ellis case and Mr. Savage says he was a truthful witness in that case. We can argue about the meetings forever.

THE COURT: Anything you want to add, Mr. Savage?

MR. SAVAGE: No, your Honor, not on that point.

THE COURT: I am of the opinion that the defendant is entitled to the two-level credit for acceptance of responsibility. As to the automobile question, the only thing I'm interested in is what happened after May the 30th. It may well be that years prior, back in 1984, there may have been some flimflamming, but the only testimony we have here is that Jim Love is reported to say, "Pay me when you can," and there has been very little action since that time. And if there was an agreement to pay $10,000 and it hasn't been paid, it is not my job to pay it.

MR. HUNDLEY: Your Honor, the car has been paid for. I believe the Government –

MR. SAVAGE: I think that is accurate, that as of this day, it has now been paid for.

MR. HUNDLEY: He is suggesting like I paid it last night after the hearing.

MR. SAVAGE: No, it was well after we caught him, but well before this hearing.

THE COURT: Well, when was it paid?

MR. SAVAGE: What?

THE COURT: When was it paid?

MR. HUNDLEY: It was paid several months ago while the dispute was going on, your Honor. I had told Mr. Moore, "We are going to pay for this car."

THE COURT: Several months ago on May the 30th, 1990, this agent, Mr. Kuhn, reported that it hadn't been paid.

MR. HUNDLEY: I can get your Honor the precise date.

THE COURT: I don't want the precise date. If everybody is in agreement it was paid, it is then the overexuberance of the Internal

Revenue Service to say it is not paid. Do you have any proof it is not paid, Mr. Kuhn?

THE WITNESS: No, I believe the question, your Honor, was did I know that it had been paid; and it was my understanding at the April 9th sworn interview, that it had not been paid at that time.

THE COURT: April 9th?

MR. HUNDLEY: It was paid prior to that, your Honor.

THE COURT: Well, nobody asked you anything about April 9th. They were asking you about May the 30th. All right, that is all right. Thank you very much and as to the 1984 campaign in which Mr. Moore apparently accounted for $23,000 of the so-called 100,000, if that is all it was, and then Craig, according to Agent Kuhn, finally told the truth as a result of the cooperation of Mr. Moore on May 30th, 1990 there is a debriefing in which more names were given; and that brought the total up to $33,000. What is the failure to cooperate here, Mr. Savage?

MR. SAVAGE: Your Honor, that is not my recollection of the agent's testimony. My recollection is that Craig came in first, then Moore came in and admitted 23,000. To this day it is now up to 33,000, but he still won't tell us where the rest of the money is.

THE COURT: You take that important point to the Fourth Circuit Court of Appeals and have a good time.

MR. SAVAGE: I will, thank you, your Honor.

THE COURT: Anything else, then, gentleman? Do you have other matters?

MR. SAVAGE: I have remarks.

THE COURT: That cuts the level of responsibility down to between 6 and 12, as I understand it.

MR. HUNDLEY: Yes, your Honor.

MR. SAVAGE: I have some observations relating to the other counts, your Honor, if I might.

THE COURT: Yes. What opposition?

MR. SAVAGE: No, observations.

THE COURT: Observations, all right now, be careful. Don't violate that plea agreement because you will set this house on fire if you do.

MR. SAVAGE: Your Honor, I believe every factual matter that I am about to refer to is contained in the presentence report.

So, your Honor, for nearly four decades, Arch A. Moore, Jr. was a dominant figure on the West Virginia and occasionally the national political scene. And while untold thousands of words have been written to describe Arch Moore, this Court today must fashion a sentence most appropriate for the one word that best describes him. Let there be no mistake. Arch A. Moore, Jr. is a criminal. This Court's sentence needs to reflect that central fact.

As a group, these crimes represent a reprehensible pattern of criminal conduct, yet the indictment itself makes it clear that individually each of these charges are only one in a series. They begin in 1984 with Moore funneling over $100,000 cash illegally into the 1984 campaign. The obstruction of justice count includes Moore hiding the fact that he spent approximately $35,000 illegally in the 1988 election as well.

While Moore extorted over $570,000 from Paul Kizer to assist him in getting a refund from the black lung fund, his plea to the tax charges here makes it clear that he also extorted 50,000 from John Smith and Marrowbone Coal Company, 2,500 from Robert Gilliam, a Logan County businessman, $10,000 from Talmadge Mosley of Island Creek Coal Company, and $10,000 from Sam D'Annunzio, a Clarksburg businessman. Each of those entities and persons had business with the state and paid Moore to get what they wanted.

MR. HUNDLEY: Your Honor, I really hate to object, honestly I do. But those statements about John Smith and this indictment and that connection are just flat out wrong. He is not charged in the indictment with any extortion in connection with Marrowbone or John Smith. He's not even charged with filing a false — evasion. He is just charged with filing a false return.

THE COURT: False tax return.

MR. HUNDLEY: And for him to get up here and start characterizing, that has been the problem with this thing from word one and

why we ended up here yesterday. This is the same falderal which was submitted and withdrawn.

MR. SAVAGE: These payments are not taxable if they weren't extorted. That is the bottom line. Those tax returns are not false if these weren't extortion. Mr. Hundley knows it.

MR. HUNDLEY: It is nowhere in this indictment. It is nowhere in this indictment.

THE COURT: You may use the term extortion in connection with Count 2, which is a Hobbs Act. Otherwise, forget it.

MR. SAVAGE: Okay. Your Honor, the obstruction charge also makes it clear that Mr. Moore obtained $150,000 in 1989 from Paul Kizer, that 150,000 being, as the presentence report lays out, only the initial payments on an eight year, 1.4 million dollar agreement by Kizer to pay Moore. That money was promised to Kizer – by Kizer and the remaining days in Moore's term to acquire Moore's assistance in obtaining super tax credits for Kizer's companies. This transaction was concealed as a false legal agreement between Kizer and Moore, just as the extortion involving Kizer in Count 2 had been.

Moore clearly felt he had to obstruct the investigation, as he plead guilty to in Count 5, relating to his relationship with Mr. Kizer because Kizer had already paid, as the presentence report lays out, $50,000 at Moore's request to the National Republican Governor's Association in October 1988 to buy Moore's help if he, Kizer, was convicted on murder charges.

MR. HUNDLEY: Your Honor, again as reluctant as I am, there is absolutely nothing in this indictment about a pardon and Kizer's connection with it. And, you know, it's just – you have told him over and over again to stick to what is in this indictment. And for him to bring up that highly prejudicial matter, which is wrong at this time, I have got to object, your Honor.

THE COURT: Wait a minute. The presentence report did refer to a potential pardon of Kizer.

MR. HUNDLEY: That's right. The presentence report referred to it, but you told Mr. Savage to stick to what is in this indictment.

THE COURT: No, I don't believe I did as far as commenting on it. Can't I take notice of what is in the presentence report?

MR. HUNDLEY: Yes, sir, you certainly can.

THE COURT: Which you agreed was correct.

MR. HUNDLEY: But the characterization of it by Mr. Savage, I object to. Certainly, your Honor can.

THE COURT: All right. If I get to the point where I have to control the characterization of all lawyers' speeches, I will be in bad shape, I can tell you that. Go ahead.

MR. SAVAGE: Thank you, your Honor. As Moore's plea to Count 5, the obstruction charge, also makes clear, he obtained another $20,000 from a company interested in obtaining a landfill in West Virginia, although that landfill deal never came to fruition. His plea to the obstruction count in this indictment also reveals a pattern of cover-ups. Moore failed to report any of the proceeds from his payments, including extortions, on his tax returns, except for the $523,000 which he falsely characterized as a legal fee.

THE COURT: He did report that, didn't he?

MR. SAVAGE: That is right. He said it was legal services rendered. That's a lie. He further engaged in a pattern of obstruction of justice by trying to get Kizer and Leaberry to lie and by repeatedly lying himself to federal investigators. He falsified documents and he had Kizer falsify documents to cover up his various extortions. Each one of those acts of lying and falsifying constitutes separate obstruction of justice violations.

With respect to the illegal, and in his words "underground campaigns," he hid the money from investigators and voters by agreeing to have false fund raisers made up and false campaign committees to account for the source of the funds.

While the fact that these offenses constitute a pattern of fraud, false tax returns, extortion, and obstruction of justice is very serious, it's impossible to ignore the gravity of these individual offenses standing alone, your Honor, particularly Counts 1 and 2. No governor or other public official of that responsibility has ever been convicted for election fraud of this scope. No public official anywhere, so far as

anybody I know can tell, ever extorted a bribe in the half million dollar range. Thus, this case typifies most dramatically the two kinds of corruption that has plagued West Virginia for at least a generation.

First, Moore capitalized on a tradition of corruption in the electoral system, raising cash illegally, buying votes with it, and then lying about it.

THE COURT: You think I should penalize Mr. Moore for the acts of others that have, perhaps, either put West Virginia on top of the list or perhaps dragged their name down?

MR. SAVAGE: Absolutely not, your Honor. He should be penalized for being a leader of the pack, but he shouldn't be penalized for the people in the pack.

The sentence here has to send the strong message that Arch Moore's brand of cash-and-carry politics is now relegated to a bygone era. It is time for all candidates high and low to obey the law. A substantial sentence would mean that no longer will indicted county bosses in this state be able to say, as they have in the past, that the governor did the same corrupt things they did and got by with it, no more. The systematic, public corruption must end, and punishing Arch Moore will further that goal.

Second, Moore was active in personal corrupt activity to enrich himself. After he bought the office of governor in the 1984 election, he then sold it out to renegade, lawless business interests for the payments that are in this indictment. When Arch Moore sold his decisions as governor, he turned the American system on its head. Moore's greed, and it's monumental, must be addressed by this Court's sentence today.

While the United States recognizes this Court must balance individual factors, such as the suffering Mr. Moore's family will endure against the needs of the general public in fashioning a sentence, it is rare that a case would have as few mitigating circumstances as this one. Moore's conduct simply cannot be explained by poverty, or excused due to fashion. It's not a product of ignorance, youth, or lack of opportunity. There were no mistakes or mere isolated lapses of character. Rather, it's plain and simple criminal conduct motivated by

greed and fueled by a contempt for law enforcement in the ordinary rule of law that governs us all and guarantees an orderly society.

This Court can make it clear that Arch A. Moore, Jr. is no longer beyond and never was above the law. In mitigation, this Court can and should consider that Arch Moore does have achievements as a politician that have been substantial. His longevity as a West Virginia public official, his chairmanship of the National Governor's Conference and the Republican Governor's Association are important accomplishments. Highways, welfare programs, kindergarten, and clothing vouchers for the poor are a significant legacy.

Further, it is hard not to admire the intellect and the determination, the resilience, the sheer endurance and force of personality that is Arch A. Moore, Jr.; but it is likewise impossible not to look at the duplicity, the greed, and the unparalleled corruption perpetrated by this same man. A substantial part of the harm caused here is due to the way Moore has mislead and deceived many, many supportive West Virginians. As he plead guilty on Election Day 1990, Moore's defenders still stepped forward and urged West Virginians to remember the Arch Moore of accomplishment, for example, the Arch Moore who started the program of $30 clothing vouchers for poor children in 19 — in the 1970's. Moore's attorney —

THE COURT: Where are you getting all this garbage from?

MR. SAVAGE: Excuse me?

THE COURT: Where are we getting all this garbage from? I mean, I haven't heard this.

MR. SAVAGE: Your Honor, I am about to say, essentially, Mr. Moore's attorney is asking you to do that same thing today, to consider the Arch Moore that is the war veteran.

THE COURT: Yes, yes. Well, and also from 1968 to 1976, I heard no particular criticisms how he operated then.

MR. SAVAGE: There are none, your Honor, that we are asserting today. All I would ask is that this Court on behalf of the United States remember not just the Arch Moore that the defendant presents, but the Arch Moore who spent $65,000 of illegally-obtained cash on Oxxford suits from 1984 to '88, as the presentence report lays out. I would ask this Court to recall —

THE COURT: Is that anything against the law? I agree that I have never been in that category, but is there anything against the law of paying $900 to $1,000 for a suit of clothes?

MR. SAVAGE: Only if the cash is obtained from a source it shouldn't have been, and that is exactly what the proof and the presentence report here makes clear.

Further, I would like the Court to recall the Arch Moore hunched over in his secretary's car behind the incinerator as he met to arrange his lies with Paul Kizer. I would ask the Court to remember the Arch Moore lurking at Mackey's Exxon, telling John Leaberry to lie to the grand jury. That's the real Arch Moore.

Arch Moore has offered no apology, and his failure to apologize is particularly galling. When the previous governor, Governor Barron, was indicted, Moore was quick to proclaim, "Regardless of the guilt or innocence of those involved, great damage has been done to the image of West Virginia. We must once again apologize to the nation."

Well, the truth is we have nothing to apologize to the nation for. It's this defendant that has done the great damage. It's time for this defendant to apologize.

The real function that this Court can serve is to impose a sentence that reaffirms what honest public officials and decent citizens believe, a sentence that deters future public officials and directly punishes the defendant for his crime. A sentence is needed that says, "Corruption and hypocrisy will not be tolerated here." Arch Moore always held himself out as the person West Virginians can turn to for honesty and integrity. He promised in 1967 and '68 to end the excesses and abuses of state government by past admissions and vowed to rid West Virginia of corruption once and for all.

He repeated the theme in his inaugural remarks wherein on January 13th, 1969, he stood on the capitol steps to take the oath of office –

MR. HUNDLEY: I really have to object.

THE COURT: Yes, I think you have gone beyond the limits. You are now referring to something that occurred 22 years ago.

MR. SAVAGE: Right, your Honor.

THE COURT: Forget it. You can't make those speeches to me and impress me any with that.

MR. SAVAGE: Okay, your Honor.

THE COURT: I am not impressed by that. If you want to make it, make it to the press. They love it.

MR. SAVAGE: Yes, your Honor.

Your Honor, while this Court's experience in imposing sentence in public corruption cases is vast, perhaps unique in the country, to this community this is not just another case of a crooked politician. This Court's sentence needs to send a clear and unequivocal message, and if it does it can have a profound effect on the way public life is conducted in this state.

Arch Moore, more than any other public figure, epitomizes what has been wrong with the way the public's business has been conducted in this state. And nothing will change without a sentence –

MR. HUNDLEY: Again, I object to that statement. I mean, this is an individual case, epitomize –

THE COURT: I can't stop him from making his appeal if it doesn't violate the plea agreement. If it violates the plea agreement, then I want to hear from you.

MR. HUNDLEY: I would say he has certainly violated the spirit of the plea agreement with his speech.

THE COURT: The plea agreement spells it out, whatever it is. I don't have it before me.

MR. HUNDLEY: He has agreed – he is supposed to not make any specific recommendation as to sentence.

MR. SAVAGE: And he has made none.

THE COURT: Yes, you have. You have made a recommendation that it be sufficiently severe.

MR. SAVAGE: Right. And I leave that to the Court to judge how much. It is likely that all people would disagree on what that is. I have a personal recommendation –

THE COURT: As far as I am concerned, get finished with your speech, will you.

MR. SAVAGE: I will, your Honor.

THE COURT: Go ahead.

MR. SAVAGE: Your Honor, it is time that there be a watershed event, and this sentencing can be that event that can pull us out of the history of public corruption that Arch Moore, at least for the last five years, at least by his admissions in this indictment, epitomized so clearly. I ask the Court to fashion a sentence that reflects that goal. Thank you, your Honor.

THE COURT: All right, Mr. Hundley. Do you wish to respond?

MR. HUNDLEY: Just very briefly, your Honor. You know, I think that it violates the spirit of this plea agreement, and I know your Honor is well alert to all of this, but, you know, again –

THE COURT: I don't have the plea agreement in front of me.

MR. HUNDLEY: I will read it to you.

THE COURT: What does it say?

MR. SAVAGE: It says the United States is obligated to bring the nature and seriousness of the offense to the Court's attention.

MR. HUNDLEY: That is not it. Here it is.

THE COURT: Here we are.

MR. HUNDLEY: However, the United States retains the right to inform the probation officer of the court of any relevant facts, to address the Court with respect to the nature and seriousness of the offense, and to respond to any questions raised by the Court, correct any inaccuracies in the presentence report. The matter – there have been no promises or representations whatever made to Mr. Moore by the United States or any of its agents as to what the final disposition in this matter will be. It is understood that the matter of sentencing is within the sole discretion of the Court, and the United States will make no recommendation as to a specific sentence.

THE COURT: Well now, there we go. They admit and they don't deny it yet that it is in my sole discretion. They have not made a specific recommendation as to a specific sentence. They do either directly or indirectly urge that it be sufficiently severe to let the public know that

Mr. Moore was guilty of serious offenses. But other than that, that's about all they have done. Isn't that true?

MR. HUNDLEY: Yes, sir.

THE COURT: All right. I'll hear from you in any way, Mr. Hundley, for whatever you would like to present.

MR. HUNDLEY: Again, you know, as I referred to it, you know, the spirit of the plea agreement, again, the first time I saw it was in the news media right after we signed the plea agreement down here, that Mr. Moore had bought the election in 1984 and then sold the office and whatnot. I hear it again this morning in Mr. Savage's plea argument, sentencing argument, whatnot. And, you know, that's never been charged in the indictment. I just got through objecting that I think that's one of the wrong things that has been done in here, taking this underground campaign, get all of the information from him in the first place and that has been going on for a thousand years. And they have got this $50 law around here and whatnot, to transform that into the mail fraud was quite a trick, as it was; but then in the face of all of my objections and their constant recitations that the indictment doesn't charge that, he stands up and he has got it written out and he says he bought the '84 election and then sold the office. And, you know, it just isn't fair. It just isn't right and it just isn't true.

THE COURT: All right, gentlemen. We'll take a brief recess at this time and I'll hear from the State of West Virginia after that, a ten-minute recess.

(Recess at 11:17 a.m. until 11:25 a.m., same parties present.)

THE COURT: Mr. Hundley, could I borrow from you the document that I found in the presentence report package -

MR. HUNDLEY: Yes, sir.

THE COURT: — From the State of West Virginia that you had not received a copy of and I —

MR. HUNDLEY: As I told your Honor, I advised the Government and showed them a copy.

THE COURT: All right, who appears for the Attorney General's office?

MS. SCHULTZ: Your Honor, I do. My name is Katherine Schultz from the Attorney General's office.

THE COURT: If you would come forward, please.

Is this Katherine A. Schultz?

MS. SCHULTZ: Yes, sir, it is.

THE COURT: Thank you.

MS. SCHULTZ: Would you like an opportunity to review that before I begin my brief statements to the Court?

THE COURT: Well, I am thoroughly unfamiliar with this and, of course, you apparently did not give it to the probation officer until last Friday.

MS. SCHULTZ: It was our understanding, your Honor, that the Court did not wish to see any documents until yesterday's hearing had been resolved.

THE COURT: Well, it wasn't your understanding from me because I have never had any contact with your office.

MS. SCHULTZ: No, sir, you have not. But we had talked with the probation officer about when the probation report should be submitted.

THE COURT: The difficulty is what chance does the judge have when he doesn't see it until the day it comes up? I saw it, actually, last night; and what chance does a judge have to look up the important question of what your standing may be, that is the State of West Virginia's standing and what is required in connection with this Victim and Witness Protection Act? I just — I have never had it occur before, and I assume that you have gone into it and that you are convinced that the State of West Virginia does have the proper standing; is that correct? And that this is the procedure that is followed?

MS. SCHULTZ: Your Honor, what we have found is that the Court under the Victim Restitution Act is given discretion to give victims restitution so that the victims will be made whole and will not suffer any damage as a result of criminal conduct. Therefore, the State of West Virginia comes in and asks this Court only for restitution on the damages that have resulted because of the direct actions that Mr. Moore has plead guilty to.

THE COURT: Well, you asked for the establishment of a four million dollar trust agreement of some kind, and I may have the authority to do all of these things, but I have got to be convinced that I have got some authority to do it. You have cited a couple of cases in here which I have not had an opportunity to read.

MS. SCHULTZ: Importantly, your Honor, the case in which we asked for the trust was a Fourth Circuit case in which the Court of Appeals reviewed the actions of Judge Copenhaver of this district in which he set up a trust to allow the victims at a later date, once damage had been determined with reasonable certainty, to come against the trust and collect the money that they were entitled to. And that was specifically approved.

THE COURT: Now, those are cases in which there is an admitted identification of a victim and an admitted amount; is that correct?

MS. SCHULTZ: Well, certainly the amount was not admitted and I am not even –

THE COURT: I mean, you have presented me with a situation here in which you want me to charge and create a trust for the benefit of the State of West Virginia for Mr. Moore occupying the governor's mansion for four years; and, what, are we renting the governor's mansion now as a rental? And what is the established rate? I might be interested if I could afford it.

MS. SCHULTZ: Your Honor, the State of West Virginia has found that it is impossible to assess a fair market value on the rental value of the governor's residence, just that part of the residence where the governor and his family reside; so we are withdrawing that particular request.

THE COURT: What is the authority for such? What is your authority for that? After a person has been elected a President of the United States and put in there and said, "You stay here," and then if George Bush does something wrong that we think is wrong, then he's to be charged rental; is that right?

MS. SCHULTZ: Well, first I'll address that, but as well I would like to advise the Court that inasmuch as we cannot determine a fair market value on the rental value on the mansion, we are withdrawing that part of our claim.

THE COURT: Okay. That is fine. Then that will end that so we won't have to worry about that.

Now we come back to the $500,000.

MS. SCHULTZ: Well, actually the State of West Virginia is asking for the entire refunds that were given to Mr. Kizer's coal companies, the damage to the state being the granting of the refund and not merely the money received by the former governor.

THE COURT: Well, I know nothing about how the refund was granted. Do we have evidence as to how it was granted? We know about the $500,000, how it came through purported legal fees to Mr. Moore. I am using the $500,000 as an odd figure. We know about that. But as to the refund as such, there was a provision, I understand, that was spent by the legislature, was there not?

MS. SCHULTZ: No, your Honor. That happened subsequent. I think you are talking about the window provision that was passed by the legislature in January of 1986. The Kizer companies received their refund October 2nd — or October 2nd of 1985 after meeting with the Former Governor Moore. And they received their refund at a time when emergency regulations were in force and effect at Worker's Compensation, regulations which prohibited such a refund.

THE COURT: Well, didn't these regulations need the approval of the Department of Labor in Washington?

MS. SCHULTZ: No, your Honor, they did not. These were emergency regulations that dealt with the applications of the coal workers fund. The Federal Government's role in this action was the decision as to whether or not Kizer's companies could go self insured, and we are not raising any issue with regard to that.

THE COURT: Well, what does it say about any — you mean to tell me that the Governor of West Virginia, all he had to do was say, "Pay this money to these people," and nothing else; is that right? Nobody else did anything except maybe draw a check?

MS. SCHULTZ: No, your Honor. What we are suggesting is because of the governor's agreement and because of his involvement in the case, as shown by his acceptance of the bribe, that the governor played a role which was impermissible; and as a result of that role, the coal company received approximately 2.3 million dollars that they

were not entitled to and would not have gotten, absent the former governor's intervention.

THE COURT: Well, has anybody brought any attack upon that previous to this time? That was back in 1985.

MS. SCHULTZ: I believe this all came to light once the indictments – once the plea came out.

THE COURT: Who has attacked it since then? Has anybody attacked it since then?

MS. SCHULTZ: The state is waiting – if it needs to file a civil action to attack it.

THE COURT: How long has Mr. Moore been out of office? I guess he went out in January of '89; is that right?

MS. SCHULTZ: I believe that is right.

THE COURT: Well now, we have got a year and a half gone by. That wasn't enough time, was it, for the State of West Virginia to act?

MS. SCHULTZ: I believe these matters truly came to light at the time of the plea.

THE COURT: Beg your pardon?

MS. SCHULTZ: I believe that these matters came to the State's attention at the time of the plea.

THE COURT: Well, do you have any evidence to enlighten me as to what Mr. Moore did or didn't do? I mean, I know nothing except I know about the attorney's fees, the 25 percent of the 2 million odd dollars which he charged – whether he charged it to this fellow Kizer or he charged it to Maben Energy or whoever it may have been, I am not familiar with that. But, anyway, he did get over $500,000 and I think paid $50,000 to the gentleman who was either a former law partner of his or something of that kind. Now, do we have any evidence here? Because I have got to get rid of this case. I am trying a criminal case and you can – you have access to the courts of West Virginia, I would assume. It is not a state matter entirely certainly because it comes under 18, United States Code, Section 3663. That is the Witness and Victim Protection Act. But I just –

MS. SCHULTZ: That is why the state is asking –

THE COURT: You would have me accept as a foregone conclusion that Mr. Moore had sole control over making this refund, that it was an illegally made refund, illegally conceived by him and made by him with no authority under the law. And yet here — I don't know whether there has been any comment about it before or not. I assume that there has been, but I knew nothing about it until I read your memorandum except I knew, of course, what was in the indictment.

MS. SCHULTZ: And at this point we are resting on what is in the indictment, his promise to aid Mr. Kizer, the the fact that he met with Mr. Kizer, kept him informed of the progress of the refund.

THE COURT: Well, I mean, I have had to meet with people who were crooks, but it is the unfortunate situation that you meet with people, but they can be very high tech people. They can be crooks as far as that is concerned.

MS. SCHULTZ: But expressly in the indictment he admits that he made an agreement with Mr. Kizer that he would aid and assist in getting this refund, and that is exactly what happened.

THE COURT: I assume that he spoke to somebody and he, I believe, intimated that. I believe that he intimated, did he not, that he might help Kizer out even if he got in trouble from the state court action, the criminal action against him. All of this was done, as I understand it, what? In '88, wasn't it?

MS. SCHULTZ: '85.

THE COURT: '85?

MR. SAVAGE: Your Honor, if it might be of some help, there are transactions with Kizer in '88 that you just referred to, and then there is this refund issue with Kizer in '85.

THE COURT: All right.

MS. SCHULTZ: They had multiple dealings, your Honor, and it is important to note that the only refund during the time —

THE COURT: And in five years the State of West Virginia has taken no action?

MS. SCHULTZ: Well, during most of those years Mr. Moore was in office as the governor of this state.

THE COURT: Well, the governor – I don't understand that the governor is immune from criminal action of the state enforcement authorities, and that is your office, the Attorney General's office –

MS. SCHULTZ: Yes. Let me speak to that.

THE COURT: And that is part of the trouble in West Virginia.

MS. SCHULTZ: Well, let me speak to both of those issues raised. I am not suggesting that he was immune from prosecution, but what I am suggesting, that it took longer to come to light because he was in the governor's office. It's important to note that the Maben companies, there are five individual companies, were the only companies that received refunds during the time that these emergency rules were in effect. They were the only company that received a refund which is wrongful. And four of those five companies received a refund when they weren't even members in good standing in the fund.

THE COURT: What proof do you have that this is all due to Moore? I mean, governors sign documents by the thousands and they can't be responsible for the intimate details of everything that crosses their desk, of course.

MS. SCHULTZ: That is part of the problem here because Mr. Moore chose to get involved in an area that was not something that he would have day-to-day contact with.

THE COURT: And he chose to get involved in the area because he wanted that 25 percent of what was involved.

MS. SCHULTZ: And that involvement was wrong and the State of West Virginia has suffered. So we are asking for that money back.

THE COURT: How has the state suffered? You paid the money to whom, Kizer or Maben?

MS. SCHULTZ: To five separate Kizer companies.

THE COURT: All right. Now, you paid the money to them. Why did you pay it or who paid it? I don't know. The state treasurer, I suppose.

MS. SCHULTZ: The Worker's Compensation Commissioner paid, I believe. I believe the Worker's Comp. Commissioner had the checks drawn.

THE COURT: Why would he pay it?

MS. SCHULTZ: We are suggesting because of the influence of Governor Moore.

THE COURT: Is he living?

MS. SCHULTZ: She is living, but ill.

THE COURT: She is living?

MS. SCHULTZ: Yes.

THE COURT: Where is she?

MS. SCHULTZ: I really don't know, your Honor. I just know that she is ill. I really don't know where she is at this time.

THE COURT: Have you talked to her?

MS. SCHULTZ: We have made arrangements to talk to her, but are not able to do so because her attorney is out of town.

THE COURT: What do you expect me to do, ma'am?

MS. SCHULTZ: What we would like this Court to do is set this money in trust, as the Fourth Circuit did in *Barringer*, put the money in trust so if the State of West Virginia prevails, as we expect to in our civil action, that there will be money for the State of West Virginia to take. That's precisely what happened in *Barringer*. The Court said we cannot award judgment –

THE COURT: Where is it? If I have read the *Barringer* opinion – I have not seen it.

MS. SCHULTZ: I can give you a copy. It is coming out of the Fourth Circuit. I can hand you a copy if you would like to wait just a moment.

THE COURT: I wish you would.

(Pause, handing to the Court.)

This opinion bases the authority of the Court on the probation statute, which is Section 3651 of Title 18. Of course, probation is a matter of leniency. And I concede that I could arbitrarily take one of these counts of the indictment, perhaps, and purposely put him on probation to fit in with this trust. But do you think that's appropriate?

MS. SCHULTZ: We don't believe that the fact that this particular case that arises under the probation statute precludes it's use, the same as used for a sentencing crime.

THE COURT: What is the other authority, then, that you have that gives me the authority to? If you are correct, there is a line of cases, of course, that permits a Judge, for example, on Count 3 in Mr. Moore's case to which he has plead guilty, that involves the income taxes for the year 1984, I believe. I have a right to order the payment of the 1984 income taxes by Mr. Moore. I frequently do it. And then Count 4 deals, I believe, with a 1985, and I have that right; but there are hundreds of cases that say that I would not have the right to say, "All right, Mr. Moore, you are going to have to repay every tax year that the Government finds where there is a delinquency." I don't have that authority to do that. I did it once and promptly got reversed and I learned my lesson from that. That is the easiest way to learn your lesson.

That's exactly what you want me to do in this case. You want me to put the securities or money or whatever it might be aside in trust to protect you. Well, if that is the case, I ought to create the trust for the benefit of the Government, shouldn't I?

MS. SCHULTZ: The Government is not the party that has been damaged by Mr. Moore's conduct.

THE COURT: Oh, yes, on income tax evasion, they are certainly damaged there.

MS. SCHULTZ: Well, on that particular count.

THE COURT: What?

MS. SCHULTZ: I agree with you on that particular count.

THE COURT: Well, suppose the Government had potentially other years that they thought they might have a claim, as you think you, the State of West Virginia, has a claim. And so they – the Government says, "Well, Judge, here. Go ahead and create a trust here now and protect us so there won't be any shenanigans of transferring assets and things like that." This is a 1983 case and I'm interested in it, but I'm interested in what my authority is if it's not included under the probation statute.

Apparently, under the probation statute the Fourth Circuit has said that you do have a right to create a trust for the purpose of protecting a potential creditor who might come forward, and naming that particular creditor. I suppose I could do it in the sense of saying, "Well, I'll pick one count and put Mr. Moore on probation," but I frankly would – couldn't possibly explain to anybody why I did it except to protect the State of West Virginia; and you have been sitting and doing nothing on it for five years.

MS. SCHULTZ: Well, under the Victim's Act, it says that you can give relief to the victim in addition to any other criminal sanction, including sentencing. So, that does not mean that you would necessarily have to put him on probation to give the state the trust that it is asking for.

THE COURT: This is not – this is not a situation, apparently, in which some rank outsider came in to ask to be heard in this case. I don't know. It came out of Charleston here. I am concerned about what your status is. What can I do? I have got to enter a final judgment. And in that final judgment I could dismiss your claim without prejudice; and, certainly, I would be inclined to do that because I think, number one, any time you come in on the very day of sentencing and you want some relief, you have got to give somebody a chance to look up some law. And you waited until Friday before a session on Tuesday to present this even to the probation officer. The Court knew nothing about it until late yesterday afternoon.

MS. SCHULTZ: We did that based upon the representations that we had gotten from the probation office. We didn't unilaterally decide not to submit. It was our understanding that the Court did not want any documentation prior to the Monday hearing, and so we didn't just do this –

THE COURT: Well, I don't know what documentation. Documentation is one thing. I don't know what Mr. Kuklar, if he gave you that information, meant by that, but are you intervening in this case as a party?

MS. SCHULTZ: We are submitting a victim impact statement on behalf of the State of West Virginia, which we feel we are entitled to under the federal statute.

THE COURT: Well, I am going to dismiss your claim without prejudice to your right to permit it to come in by appropriate action at some later time. I can't do anything else. I can't dream up the law. You do have some authority in the *Barringer* case that has been created here which does say that a court, when probation is granted, they can make as one of the conditions of the probation that a trust be established. Now, I don't have any excuse for putting Mr. Moore on probation for just one count. If I put him on probation, I would put him on probation for at least four of the counts if I was going to do that, but I just don't have any authority to proceed on it. And I'm sure that the defendant will appeal my sentence, and quite properly so, for my failure to give them relief on yesterday when they wanted to change the plea. And that is perfectly all right. And I have no objection to it and I have no objection to your – if you are in the case, you can go to an appeal, too. I don't know. I just don't know what your status is.

It seems to me as though you would have to make some inquiry. Just this bare language out of the *Barringer* case is also well and good, but it certainly doesn't say that in every case that the Court in imposing sentence shall either put somebody on probation on a particular charge and create a trust, nor does it say that in every case in the Federal Court which may involve a question of restitution, which has not been shown and because it is other than through suggestions, in this case, of the State of West Virginia, that I can delay it. I mean, if you are right, I would have to delay this matter a year. I guess that would please some people, at least.

MS. SCHULTZ: Well, in *Barringer* the person is sentenced, but the trust stays open for the life of the sentence, whatever that sentence might be.

THE COURT: How about the life of the probation here? Barringer was five years. Now, you can do that with probation, but when you send somebody to what they frequently call the hokypoky, and he goes off to a penal institution, it begins at once.

Well, if you have no other authority, I will return your *Barringer* opinion to you, and I will direct that an order be prepared denying the claim of the State of West Virginia for restitution under the Victim and Witness Protection Act for several reasons. The main reason is that there is no proof yet that these various claims, as purported by the

State of West Virginia, are sufficiently connected with Mr. Moore to justify the creation of a trust at this time under the – similar to the *Barringer* provision.

All right. We come now to the difficult problems of sentencing, and I take it if there is nothing further – is there anything further from the Government?

MR. SAVAGE: Nothing from the Government, your Honor.

THE COURT: Anything further from the defense, Mr. Hundley?

MR. HUNDLEY: No, your Honor.

THE COURT: All right. Let Mr. Moore come forward.

(Defendant sworn.)

THE COURT: Arch A. Moore, Jr., have you anything to say as to why judgment should not be pronounced against you?

THE DEFENDANT: I do not, sir.

THE COURT: On Count 1 of the indictment, it is the judgment of the Court that the defendant, Arch A. Moore, Jr., be and he is hereby committed to the custody of the Bureau of Prisons for a period of six months, unless sooner released by operation of law.

It is further the judgment of the Court that the defendant, Arch A. Moore, Jr., do pay a fine in the sum of $50,000. This sentence shall run concurrently with the sentences to be hereinafter imposed, namely Counts 2, 3, and 4, but not concurrently with the sentence to be imposed on Count 5.

As a part of the condition of this sentence, the Court will state that the defendant, Arch A. Moore, Jr., may be released on parole at such time as he may be designated by the authority empowered to make such determination as to offenses committed prior to November 1, 1987.

As a further provision with respect to Count 1, it is ordered and adjudged that the defendant shall pay the sum of $50, which is a special assessment imposed by law and which is due and payable forthwith.

On Count 2 of the indictment, it is the judgment of the Court that the defendant, Arch A. Moore, Jr., be and he is hereby committed to the custody of the Bureau of Prisons for a period of five years unless

sooner released by operation of law. It is further the judgment of the Court that the defendant, Arch A. Moore, Jr., do pay a fine in the sum of $50,000. This sentence shall run concurrently with the sentences imposed on Counts 1, 3, and 4, but not concurrently with the sentence to be imposed on Count 5. The fine shall run consecutively, one with the other, as imposed in the various counts of this indictment.

As to Count 2, the said defendant, Arch A. Moore, Jr., may be released on parole at such time as may be designated by the authority empowered to make such determinations as to offenses committed prior to November 1, 1987. The Court will also impose the same special assessment of $50 as to Count 2 of the indictment, which is required by law and is payable forthwith.

As to Count 3 of the indictment, that is the first of the income tax charges, it is the judgment of the Court that the defendant, Arch A. Moore, Jr., be and he is hereby committed to the custody of the Bureau of Prisons for a term of two years, unless sooner released by operation of law. It is further the judgment of this Court that the defendant, Arch A. Moore, Jr., do pay a fine in the sum of $10,000 on this particular count. The fine shall run consecutively with any other fine that is imposed. The sentence of imprisonment shall run concurrently with the sentences imposed on Counts 1, 2, and 4, but consecutively with the sentence imposed on Count 5.

The said defendant, Arch A. Moore, Jr., may be released on parole at such time as may be designated by the authority empowered to make such determinations as to offenses committed prior to November 1, 1987.

On Count 4 of the indictment, that is the income tax charge for the year 1985, it is the judgment of the Court that the defendant, Arch A. Moore, Jr., be and he is hereby committed to the custody of the Bureau of Prisons for a period of two years unless sooner released by operation of law. It is further the judgment of the Court that the defendant, Arch A. Moore, Jr., do pay a fine in the sum of $10,000. This sentence shall run concurrently with the sentences imposed on Counts 1, 2, and 3, but consecutively with the sentence imposed on Count 5.

The fines shall be imposed to run consecutively, one with the other. The said defendant, Arch A. Moore, Jr., may be released on

parole at such time as may be designated by the authority empowered to make such determination as to offenses committed prior to November 1, 1987.

As with respect to the other counts, it is mandatory on my part that I impose a special assessment in the sum of $50 to be paid as to Count 4 of this indictment, and that amount is due forthwith.

As to Count 5 of the indictment in accordance with the Sentencing Reform Act of 1984, it is the judgment of the 6 Court that the defendant, Arch A. Moore, Jr., be and he is hereby committed to the custody of the Bureau of Prisons for a period of ten months unless sooner released by operation of law. The sentence imposed on Count 5 shall run consecutively with the sentences imposed on Counts 1, 2, 3, and 4. It is further the judgment of the Court that the defendant, Arch A. Moore, Jr., do pay a fine in the sum of $50,000. It is further the judgment of the Court that the defendant, Arch A. Moore, Jr., do pay the special assessment in the sum of $50 as required by law, which amount shall be due forthwith.

The sentence under Count 5 shall run consecutively with any other sentence imposed herein.

I believe, gentlemen, that that covers all of the counts, does it not?

MR. SAVAGE: It does, your Honor.

THE COURT: And, Mr. Moore, I have imposed fines aggregating $220,000, I believe — no, I beg your pardon, $170,000, $170,000 upon you. The financial statement that has been presented in the presentence report clearly justifies the imposition of these fines.

I shall recommend to the Federal Bureau of Prisons that you serve your term at the Petersburg Camp at — which is — it is near Petersburg. I think it is more accurately near Camp Lee, Virginia. May I say to you that they don't have any guards there with guns. It is very easy to escape, but when they pick you up, they take you back and automatically put you in the Petersburg Penitentiary, which is 100 yards from the Petersburg Camp. They do not have any escapes from the Petersburg Camp, I might add, because of that. And I have been there personally and whatever feelings you may have, I know it's an unfortunate situation for you to face the inevitable, but I will — I will

just state to you that the camp itself is not in any sense a bad institution to have to go to. I have known others that I have had to send there myself, and they have been grateful that I have selected that as an institution for them to take their punishment.

I believe that the probation officer has recommended that Mr. Moore be given the privilege of voluntary surrender. I take it the Government is in accord.

MR. SAVAGE: We have no objection to that, your Honor, some reasonable three-week time or so to allow designation and he can surrender there.

THE COURT: What do you consider a reasonable period of time, Mr. Hundley, for reporting?

MR. HUNDLEY: Well, your Honor, we — I would think a longer period, because we have a whole bunch of subpoenas. We have got to testify before bar commissions and other people, and I would respectfully ask — you know, the designation might take longer than three weeks, too, your Honor.

THE COURT: I could get rid of the designation this afternoon by telephone call.

MR. HUNDLEY: You are not the Bureau — yes, I understand. I would ask for five weeks, your Honor, or a month.

THE COURT: That is awful long.

MR. HUNDLEY: A month.

THE COURT: Have you got that calendar there for me that I borrowed from Mr. Savage?

The difficulty is, Mr. Hundley, there is nothing accomplished by delays of reporting. However, I will direct that Mr. Moore begin the service of his sentence by his surrendering at the federal prison camp at — at or near Petersburg, Virginia, or Fort Lee, Virginia, whatever it may be, on Friday, noon, 12:00 o'clock noon, July 27th. That gives you about two weeks and a half and it is about the best I can do.

MR. HUNDLEY: Your Honor, the Government agreed to three weeks.

THE COURT: All right. Do you want three weeks?

MR. HUNDLEY: Yeah, they want three weeks.

MR. SAVAGE: We are not being hard guys about it, whatever is good for the Court and the defendant.

THE COURT: I don't want to send Mr. Moore to Petersburg and then have to bring him right back here because I know what the trouble is there. The Marshal Service – to get from Petersburg to Charleston, West Virginia, they go by way of New Orleans.

MR. SAVAGE: I understand, if he is lucky. When is your subpoena for?

THE COURT: The difficulty is he has to be confined and that means that he goes in by the – into the local places. Now, what is your situation as to the necessity of his appearance here? Because I don't want to have him traveling all over the country. That is not good for him and that is not good for anybody else.

MR. SAVAGE: If I could find out from Mr. Hundley, he was served with a subpoena today by the State Bar. I don't know when that is dated. We don't have any immediate plans for Mr. Moore. It is not based on our schedule or our needs.

THE COURT: What is the subpoena?

MR. HUNDLEY: They keep handing them to me all the time.

THE COURT: The State Bar, everybody knows what that is.

THE DEFENDANT: The 13th.

MR. SAVAGE: They are around here some place.

MR. HUNDLEY: That is for the 13th. That is recent. Your Honor, I would just ask for the three weeks that the Government is agreeable to. That would put it back one week from your schedule.

THE COURT: All right, three weeks brings us to the 31st of July.

MR. SAVAGE: That is fine with the Government.

THE COURT: All right, I modify my prior order and will provide that Mr. Moore be continued on his bond as presently given for his appearance at the Petersburg Federal Prison Camp on Tuesday, July 31st, 1990 by 12:00 o'clock noon.

All right, is there anything else, then, gentlemen?

MR. HUNDLEY: May I confer with Mr. Gondelman for one minute.

THE COURT: Yes.

(Pause)

MR. HUNDLEY: That is all I have, your Honor.

THE COURT: All right. I think while I –

MR. HUNDLEY: You may have a question of me.

THE COURT: I think while it is unnecessary for me to do so under the statute because he was not tried on a plea of not guilty, yet in view of the peculiar circumstances, I should advise him of his right of appeal.

Mr. Moore, you do have a right of appeal. And I know that Mr. Hundley will confer with you, and that would include the appeal from my denial of what you brought up on yesterday. And the only difficulty is that that notice of appeal must be filed with the clerk here in this court within ten days from today. The 11th day is too late unless that 11th day falls on a Saturday, Sunday or a holiday and it will not in this case, I don't believe. So that Mr. Hundley, of course, is thoroughly familiar with the necessary costs. You are not proceeding informa pauperis. The law does provide that I should notify you that if you can't afford to appeal, that I will make arrangements with the Government to pay for the cost of the appeal for you; but I think after looking at the financial statement, that I will forgo that for the present time and forget about it. But do you understand your right to appeal?

THE DEFENDANT: I do.

THE COURT: Anything else, then?

MR. HUNDLEY: No, your Honor.

MR. SAVAGE: No, your Honor. Thank you.

THE COURT: All right. Nothing further, then, the Court will – I will mention this, that I will return the the State of West Virginia's Victim Impact Statement to the probation officer, Mr. Kuklar, because that is where it came from; but I would be glad to file it if that is their desire. Here is the complete physical examination of Mr. Moore, and the probation officer should see to it that that is sent to Petersburg if

that is where he is finally designated. All I can do, of course, is recommend. I will say that if in the event my recommendation is not followed, it might be because Petersburg is filled; and if so, I would be inclined to recommend Allenwood Prison Camp, which is in Pennsylvania. But let's wait and see what the situation is.

MR. SAVAGE: Your Honor, the State of West Virginia has requested that you please file the document that you are referring to Mr. Kuklar. They would like that filed.

THE COURT: All right, let the record indicate that at the request of the State of West Virginia, the Victim Impact Statement, which was forwarded to the probation officer last Friday and was seen by me for the first time late yesterday afternoon, will be filed with the papers in the case.

Anything else, then, gentlemen?

MR. SAVAGE: No. Thank you, your Honor.

THE COURT: If not, court is adjourned until tomorrow morning.

(The sentencing hearing was concluded at 12:25 p.m.)

CERTIFICATE

I, Jennifer Vail-Kirkbride, Registered Professional Reporter and Official Reporter of the United States District Court, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-styled action on the 10th day of July, 1990, as reported by me in stenotypy.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Given under my hand this 2nd day of August, 1990.

/s/

Official Court Reporter
United States District Court

Supreme Court, U.S.
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No. 91-27

In the Supreme Court of the United States

OCTOBER TERM, 1991

ARCH A. MOORE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in finding that petitioner failed to show, as required by Fed. R. Crim. P. 32(d), that there was a "fair and just reason" to withdraw his guilty pleas.

2. Whether the government breached its undertaking, as part of the plea agreement, not to recommend a "specific sentence."

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

United States v. *Allard*, 926 F.2d 1237 (1st Cir. 1991)	6
United States v. *Clark*, 931 F.2d 292 (5th Cir. 1991)	6, 8
United States v. *Goldberg*, 862 F.2d 101 (6th Cir. 1988)	6
United States v. *Hurtado*, 846 F.2d 995 (5th Cir.), cert. denied, 488 U.S. 863 (1988)	6, 7
United States v. *Ray*, 828 F.2d 399 (7th Cir. 1987), cert. denied, 484 U.S. 1045 (1988)	6
United States v. *Rhodes*, 913 F.2d 839 (10th Cir. 1990), cert. denied, 111 S. Ct. 1079 (1991)	6
United States v. *Scott*, 929 F.2d 313 (7th Cir. 1991)	6, 8

Statutes and rules:

18 U.S.C. 1341	2
18 U.S.C. 1503	2
18 U.S.C. 1951	2
26 U.S.C. 7206(1)	2
Fed. R. Crim. P.:	
Rule 11	3, 7
Rule 32(d)	4, 6, 8
Advisory Committee note	8

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 931 F.2d 245.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1991, and rehearing was denied on May 16, 1991. The petition for a writ of certiorari was filed on July 2, 1991. The jurisdiction of this Court rests on 28 U.S.C. 1254.

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Southern District of West Virginia to mail fraud (18 U.S.C. 1341), extortion under color of official right (18 U.S.C. 1951), two counts of filing a false income tax return (26 U.S.C. 7206(1)), and obstruction of justice (18 U.S.C. 1503). The district court sentenced petitioner to a total of five years' imprisonment on the first four counts, consecutive to a 10-month prison term on the obstruction of justice count. In addition, the court imposed fines totalling $170,000. The court of appeals affirmed. Pet. App. A1-A8.

1. Petitioner is the former Governor of West Virginia. On April 12, 1990, he entered into a written plea agreement in which he agreed to plead guilty to a five-count federal indictment. He formally entered guilty pleas in court on May 8, 1990.

The indictment to which petitioner pleaded guilty consisted of 21 pages and set forth the charges in detail. Briefly, Count 1 charged that petitioner defrauded West Virginia and its citizens by using the United States mails to file false and fraudulent campaign reports that failed to disclose his receipt and expenditure of at least $100,000 in cash during the 1984 election campaign. C.A. App. 12-17. Count 2 charged that, after petitioner's 1984 election as Governor, he extorted $573,000 from a West Virginia coal mine operator in exchange for helping the operator obtain refunds of more than $2 million from the State's Black Lung Fund. *Id.* at 18-22. Counts 3 and 4 charged that petitioner's 1984 and 1985 federal tax returns falsely failed to report a total of at least $72,500 that petitioner received as income in those years. *Id.* at 23-24. Finally, Count 5 charged that petitioner obstructed a federal grand jury investigation in 1989 and 1990 by providing false in-

formation, falsifying documents, and instructing other witnesses to testify falsely. *Id.* at 25-32.

Prior to accepting the guilty pleas, the court summarized the indictment, and ascertained that petitioner understood the charges and wished to plead guilty to each count. C.A. App. 42-47. The court further made inquiry of petitioner, under oath and pursuant to Fed. R. Crim. P. 11, to determine that he understood the maximum penalties for each count, C.A. App. 49-52, and that he understood his right to trial by jury and the various other rights he was waiving by pleading guilty, *id.* at 53-54. Petitioner indicated that he understood his rights and stated that he was pleading guilty freely and voluntarily, because he was in fact guilty of the charges in the indictment. *Id.* at 55, 58-59. The government then described the underlying facts, *id.* at 61-67, and both petitioner and his counsel agreed that the government's recitation was "substantially correct," *id.* at 68.

2. On June 19, 1990, more than two months after the plea agreement was signed and six weeks after petitioner formally entered his guilty pleas in court, petitioner's counsel advised the court that petitioner wished to withdraw the pleas. A motion to withdraw the pleas was filed on June 28, 1990, and the court heard argument on it on July 9, 1990.

At the time of the hearing, the court had before it two affidavits from petitioner's counsel regarding the events leading to the guilty plea. Pet. App. A46-A49, A50-A54. Those affidavits stated that between January and April 1990 counsel had participated in several meetings with the prosecutors and had twice allowed petitioner to be interviewed regarding events underlying the then-ongoing federal investigation. On April 11, 1990, the prosecutors allowed defense counsel to listen to certain incriminating tapes involving petitioner's obstruction of justice, and

informed counsel they were prepared to seek a multi-count indictment of petitioner. The prosecutors offered, however, to enter into an agreement in which petitioner would plead guilty to only five counts. The prosecutors told counsel that petitioner would have to accept the agreement no later than the morning of April 12, rather than April 13, as counsel had requested. While petitioner expressed "reservations" to counsel regarding four of the five counts, counsel "strongly advised" petitioner to accept the agreement after the government agreed to structure it so that only the fifth count, involving petitioner's obstruction of justice, would be subject to the federal Sentencing Guidelines. Counsel told petitioner he "was not happy with the plea agreement, but it was clearly the lesser of the two evils from which we had to choose." Petitioner signed the agreement on April 12, 1990. Pet. App. A47, A51-A52.

Defense counsel's affidavits further stated that petitioner balked at the government's version of the facts after he signed the plea agreement. Pet. App. A52-A53. When, following his entry of the guilty pleas and as the presentence report was being prepared, petitioner refused to accept responsibility for the crimes, counsel advised him to consider whether to seek to withdraw his guilty pleas. *Id.* at A53-A54.

3. The district court denied petitioner's motion to withdraw his guilty pleas. The court concluded that "[t]here is no fair and just reason why I should permit now the withdrawal of the pleas of guilty which were made voluntarily under oath." Pet. App. A42. Petitioner was sentenced the next day.

4. The court of appeals affirmed. Pet. App. A1-A8. The court held that, under Fed. R. Crim. P. 32(d), a defendant bears the burden of demonstrating a "fair and just reason" for withdrawing his guilty plea and that the determination whether the defendant has carried that burden

"is entrusted to the discretion of the district court." Pet. App. A3-A4. Examining the particular facts of this case, the court of appeals concluded that the district court had not abused its discretion. The court emphasized that "[f]irst and most importantly, [petitioner], a lawyer and former governor assisted by competent counsel, was simply not convincing in claiming that the Rule 11 plea was not knowing and voluntary." Pet. App. A4. The court further noted that petitioner "never made credible assertions of his innocence," there was a "long delay[ ]" between the entry of the pleas and the motion to withdraw, defense counsel competently represented petitioner, and "a reopening of the plea would have been futile." *Id.* at A4-A5. While the court did not believe the prosecution would suffer any real prejudice if the plea were withdrawn, the court explained that the controlling "factors are only balancing considerations, and so the lack of prejudice to the government, in and of itself, is not dispositive." *Id.* at A5.

The court of appeals also rejected petitioner's claim that the government had violated the terms of the plea agreement at the sentencing hearing. The agreement stated that the government would "make no recommendation as to a specific sentence," but could "address the Court with respect to the nature and seriousness of the offense." Pet. App. A8. At the sentencing hearing, the government sought "a sentence that deters future public officials." *Id.* at A106. The court of appeals held that the prosecutor had not breached the plea agreement, since no "specific sentence" had been recommended. *Id.* at A7-A8.

ARGUMENT

The court of appeals correctly applied the law in holding that the district court acted within its discretion in not allowing petitioner to withdraw his guilty pleas. Peti-

tioner's fact-specific claim to the contrary and his claim that the prosecutor violated the terms of the plea agreement do not warrant further review.

1. Fed. R. Crim. P. 32(d) allows withdrawal of a guilty plea "upon a showing by the defendant of any fair and just reason." Consistent with the rule's plain language, the federal courts of appeals consistently have held that a defendant bears the burden of showing a fair and just reason for withdrawing his guilty plea. See, *e.g.*, *United States* v. *Allard*, 926 F.2d 1237, 1243 (1st Cir. 1991); *United States* v. *Rhodes*, 913 F.2d 839, 845 (10th Cir. 1990), cert. denied, 111 S. Ct. 1079 (1991); *United States* v. *Hurtado*, 846 F.2d 995, 997 (5th Cir.), cert. denied, 488 U.S. 863 (1988); *United States* v. *Ray*, 828 F.2d 399, 422 (7th Cir. 1987), cert. denied, 484 U.S. 1045 (1988). Moreover, a district court's decision denying leave to withdraw a guilty plea is reviewed under a deferential abuse of discretion standard. See, *e.g.*, *United States* v. *Clark*, 931 F.2d 292, 294 (5th Cir. 1991); *United States* v. *Scott*, 929 F.2d 313, 315 (7th Cir. 1991); *United States* v. *Goldberg*, 862 F.2d 101, 104 (6th Cir. 1988).

The court of appeals correctly held that the district court did not abuse its discretion in concluding that petitioner failed to carry his burden of demonstrating a fair and just reason for withdrawing his pleas. The court balanced various factors considered in prior cases and concluded that the only factor that seemed to tilt in petitioner's favor was that the government had not shown that it would be prejudiced if the pleas were withdrawn. The court concluded that a number of factors weighed against allowing petitioner to withdraw his pleas, including the fact that petitioner is a sophisticated litigant who entered into a plea agreement with the assistance of able counsel and had offered no justification for withdrawal of the pleas. Pet. App. A4-A5. In those circumstances, the court

of appeals properly held that the district court did not abuse its discretion. See *United States* v. *Hurtado*, 846 F.2d at 997 (defendant "argues that withdrawal would not have prejudiced the Government, but that fact alone does not mandate permission to withdraw a plea when, as here, no credible reason is proffered") (internal quotations omitted).

Totally without merit is petitioner's suggestion (Pet. 5) that "the Fourth Circuit and District Court applied two improper standards which make it virtually impossible for a plea ever to be withdrawn." Petitioner's first claim, that the courts below "held that a showing of fraud was necessary before a plea could be withdrawn," *ibid.*, lacks any basis in the record. The court of appeals, which carefully balanced several factors in determining that petitioner set forth no good reason for withdrawing his plea, never even mentioned fraud and certainly never held it to be the only basis for withdrawing a guilty plea. And, while the district court did suggest in a give-and-take colloquy with defense counsel that fraud was one possible basis for withdrawing a guilty plea (Pet. App. A31), that court never held that fraud is the exclusive basis for withdrawal.

Similarly insupportable is petitioner's suggestion (Pet. 5) that the courts below "rationalized their decision not to grant an evidentiary hearing on the ground that, because Petitioner's plea was entered following an inquiry under Rule 11 of the Federal Rules of Criminal Procedure, Petitioner should not be entitled to testify because he could face a charge of making a false statement." The court of appeals' opinion nowhere states that petitioner could not have testified at an evidentiary hearing because it would have been necessary for him to contradict representations that he made during the Rule 11 plea proceedings. In any event, there would have been no error in emphasizing that representations made during a Rule 11 plea hearing

should, absent some compelling circumstance not present here, be binding. See Advisory Committee Note to 1983 Amendment to Rule 32(d) ("Given the great care with which pleas are taken under this revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal before sentence whenever the government cannot establish prejudice"). In *United States* v. *Scott, supra,* for example, the court stated that "voluntary responses made by a defendant under oath when entering a guilty plea [should] be binding," 929 F.2d at 315 (internal quotations and brackets omitted), and held that "[t]o allow Scott to withdraw his plea because of secret expectations that he harbored in the face of his directly contradictory sworn testimony would undermine the strong societal interest in the finality of guilty pleas," *ibid.* Cf. *United States* v. *Clark,* 931 F.2d at 294 (in upholding the denial of a request to withdraw a guilty plea, the court noted that the defendant "did plead guilty under oath to a federal district judge").

2. Petitioner also claims (Pet. 7-8) that he should have been allowed to withdraw his pleas because, in orally urging the court to impose a sentence that "deters future public officials and directly punishes the defendant for his crime" and that "send[s] a clear and unequivocal message" (Pet. App. A106, A107), the prosecutor breached the plea agreement. That agreement provided that "the United States will make no recommendation as to a specific sentence," but that it "retain[s] the right to inform the probation office and the Court of any relevant facts, [and] to address the Court with respect to the nature and seriousness of the offense." Pet. App. A58. The district judge, to whom the sentencing remarks were directed, observed that the prosecutor had "not made a specific recommendation as to a specific sentence." *Id.* at

A108.* In affirming this conclusion, the court of appeals adopted a straightforward interpretation of the plea agreement which had been negotiated by "very able" defense counsel and signed by a sophisticated defendant. The court properly concluded that petitioner "did not have a reasonable basis to believe that the prosecutor's promise to refrain from recommending a *specific* sentence protected him from remarks calculated to induce the Court to issue a *severe* prison term." *Id.* at A8.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1991

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* By quoting the court's initial remark but not its conclusions (see Pet. 7), petitioner incorrectly suggests that the district court found a breach of the agreement.

U.S. GOVERNMENT PRINTING OFFICE 1991—282-061/45062